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Vol. V

TRANSCRIPT OF RECORD

(Pages 2156 to 2544)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE OF COVER]

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 2, 1947.

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THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

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No. 85

AMERICAN THEATRES ASSOCIATION, INC., SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION, JOSEPH MORITZ, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

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Colloquy

Mr. Davis: If your Honors please, I expected this morning to have the additional statistics, but, due to the unfortunate death of the treasurer of the company, they have closed their offices, and that has put me behind, so I will not be able to present those statistics

(2949)

at this time.

Mr. Wright: If the Court please, I would first like to see that some corrections are made of record here with respect to exhibits. There were certain exhibits, that is, Nos. 72, 120 and 133 which have been stamped by the clerk as received in evidence, but the record transcript does not reflect them as having been received, and I think the transcript should be corrected accordingly. I take it there is no objection from anyone.

Mr. Proskauer: Probably won't be if you will talk so we can hear you.

(2950)

Mr. Wright: As to Exhibit 153, that is also marked as having been received in evidence. However, I do not believe it clearly appears in the record that it was received, and it should appear in the record as having been received.

Mr. Caskey: Just a minute, Mr. Wright. 72 is the first one?

Mr. Wright: 72. That appears at page 283 of the transcript; and 120 at page 318; Exhibit 133 at page 325.

Mr. Davis: Are you using the numbers now that are in your—

Mr. Wright: The typewritten transcript.

Mr. Davis: But not the numbers in your Government Exhibit list?

Mr. Wright: Yes, I am referring to the exhibit—

Colloquy

Mr. Davis: The same numbers?

Mr. Wright: Yes, the same numbers.

Mr. Caskey: As to those three, 72, 120 and 133, our records show they were admitted.

Mr. Wright: I do not think there is any question about it. And 153 is also marked as having been received and I think the record was ambiguous in that respect and it should clearly appear that it is in evidence. That I think is at page 348 of the transcript.

Mr. Caskey: We show it admitted.

Mr. Wright: There are a couple of errors in description in the list of Government's exhibits for identification (2951)

that I would like to call to the Court's attention at this time. The description as to 221, if you will turn to page 104 of the Government's exhibits for identification——

Mr. Davis: What is wrong about that?

Mr. Wright: 221 should have, in addition to the theatre names that you see there, added to it the Tower and the 69th Street.

Mr. Proskauer: Whatever the agreement shows, it shows. I haven't got it before me.

Mr. Wright: That is right, but this is just for your——

Judge Bright: They are all of Philadelphia?

Mr. Wright: — and the Court's convenience. (To Judge Bright:). Yes.

Then as to the following exhibit, 222, the description you see there should be stricken. That exhibit is a supplementary agreement between Paramount and Fox West-Coast, dated November 5, 1943, which supplements Exhibit 232, and if you will turn to page 102, Exhibit 200, at the bottom of the page, the theatre

Colloquy

names there, Crotona, Nemo and Park Plaza, those should be stricken, and the correct theatre names are Riverside, Colonial and 81st Street.

(2952)

Then I have some corrected data which has been furnished us by the defendants since our case was closed, which I should like to have marked and added. The first is an exhibit which I should like to have marked as 95-A, which corrects errors that appeared in Exhibit 95. That relates to RKO's interrogatory answers.

(Marked Government's Exhibit 95-A.)

Mr. Wright: And a supplemental answer to interrogatories 3, 12 and 13, submitted by Warner Bros., which modifies the data previously offered in evidence as Exhibit 125. I will ask to have that marked as Exhibit 125-A.

(Marked Government's Exhibit 125-A.)

Judge Bright: 125 was excluded, wasn't it?

Mr. Wright: I think not.

Judge Bright: Oh; I see. Part of it was.

Mr. Caskey: 4 and 5 were excluded, your Honor.

Mr. Wright: Yes, that is correct. What I have just offered relates to 3, 12 and 13.

And I have here supplemental interrogatory data furnished by Warner Bros., which I will ask to have marked as Exhibits 126-A and 126-B respectively; 126-A relating to Lawrence, Massachusetts, and 126-B relating to Columbus, Ohio, and Atlanta, Georgia, and Oakland, California, all of which supplement the data previously in evidence as Exhibit 126.

Colloquy

(2953)

(Marked Government's Exhibits 126-A and 126-B respectively.)

Mr. Wright: Mr. Davis has just handed me some corrections here. The first one, which relates to Exhibit 163, I will ask you to have marked in evidence as Exhibit 163-A.

(Marked Government's Exhibit 163-A.)

Mr. Wright: And this second letter also pertains to 163 and we will have that marked as Exhibit 163-B.

(Marked Exhibit 163-B.)

Mr. Wright: Then I should like to have marked and received in evidence as Exhibit 266-A, a supplementary agreement dated May 18, 1944, and letter attached, dated November 15, 1943, which extended the term of the franchise that is in evidence as Exhibit 266, one for Columbia pictures in the Warner circuit, extending it through the 1945-46 season.

Mr. Frohlich: May I see that, Mr. Wright.

Mr. Wright: The franchise in evidence is here as 266 and the supplement 266-A, you have there in your hand.

Mr. Frohlich: This extends it down to the 1945-46 season?

Mr. Wright: Through the 1945-46 season.

(Marked Government's Exhibit 266-A.)

(2954) Mr. Wright: And I have here the pages which were missing from Exhibit 272, which Mr. Raftery furnished. That is an agreement between United Artists Corporation and Fox West Coast Agency Corporation. I ask to have this marked as Exhibit 272-A.

Colloquy

Mr. Raftery: I gave you the whole file. Is that taken out of that, or what is it?

Mr. Wright: No, this relates to Stage Door Canteen.

Mr. Raftery: All right.

(Marked Government's Exhibit 272-A.)

Mr. Caskey: I would like to see it.

(Exhibit handed to Mr. Caskey.)

Mr. Caskey: Where is 272?

(Exhibit 272 handed to Mr. Caskey.)

Mr. Caskey: This is unexecuted and I have no knowledge of it.

Mr. Wright: I will withdraw it and go on to something else if there is any question about it.

Mr. Raftery: I want it in.

Mr. Wright: I say, I will withdraw it temporarily for checking and go on to something else if there is any question about what it is.

Mr. Raftery: When we produced the document we explained to the Court and to Mr. Wright that we did not have an executed copy, but we vouch for the authenticity of the copy; and we had an extensive examination of witnesses about the sliding scale on

(2955)

Stage Door Canteen, and those are the supporting documents. If Mr. Caskey can produce the original I shall withdraw the copy, but we want it in evidence.

Mr. Caskey: Well, go ahead, and we will look at 272.

Mr. Wright: Then I have here a letter agreement dated September 22, 1943, between United Artists and Loew's Inc., relating to the exhibition of a picture in the Loew's Greater New York Circuit, which sup-

Colloquy

plements Exhibit 270 in evidence, and I will ask to have this marked as 270-A.

Mr. Caskey: Is that one that I gave you?

Mr. Wright: That is my understanding.

Mr. Davis: Mr. Wright, the pencil notations on this are not part of the offer, are they?

Mr. Wright: I think those were on it when they were handed to me. I have no objection to their being erased.

Mr. Davis: I do not know where they come from and I do not know what they mean, but I do not think they ought to be part of the exhibit.

(Pencil notations erased.)

(Marked Government's Exhibit 270-A in evidence.)

Mr. Wright: Now I should also like to offer at this time, the correspondence which was identified (2956)

while Mr. Mochrie was on the stand. I take it, Mr. Leisure, there is no objection to its not being the original?

Mr. Leisure: As to this letter, if the Court please, it is a typewritten copy, not a carbon copy, and the witness did not remember receiving it, and we have no copy or original in the file. Now, if Mr. Wright will endeavor to locate a carbon copy of some kind—I do not want to raise any technical objection. On the other hand, when the witness does not have any recollection of the letter in any way, and it is not even a carbon copy, it does not seem to me that it would be proper not to raise objection to it.

Mr. Wright: Well, I might point out that in Exhibit 389, which Mr. Mochrie signed, he did recall

Colloquy

writing that letter, and he refers there to his reply to Mr. Weiss' letter of July 24th. Now we can, I suppose, have Mr. Weiss give us a statement to the effect that this is a copy of the letter that he wrote on that day.

Mr. Leisure: I wonder if we can work it out outside the courtroom, Mr. Wright. I do not want to take the time of the Court, and I assure you I shall raise no technical objection. The only question, of course, is whether or not this reply you hold in your hand is the reply received by Mr. Mochrie, if he received one.

(2957) Mr. Wright: Mr. Mochrie's is the reply, and the carbon is the letter to which he replied.

Mr. Leisure: Oh, I see. I do not think we will have any trouble with it, probably, but I think we ought to discuss it outside the court, if you would like to. I won't raise any technical objection.

Mr. Wright: Then I will ask to have marked and offer as Exhibit 391, the copy of theatre manager's weekly reports referred to in the testimony of Mr. Goldenson but not produced at that time.

Mr. Seymour: May I see it, Mr. Wright?

(Report handed to Mr. Seymour.)

(Marked Government's Exhibit 391.)

Mr. Wright: And I shall also offer in evidence as Exhibit 392, the list of grosses of foreign pictures released by United Artists Corporation which were on the list offered in evidence by Mr. Montague of Columbia as successful foreign pictures.

Mr. Raftery: Were those grosses?

Colloquy

Mr. Wright: Those were the grosses that you produced.

(Marked Government's Exhibit 392.)

Mr. Wright: I merely want to call the Court's attention to the fact that on that list of eleven pictures there is only one, In Which We Serve, which grossed in excess of \$600,000, and only one other which

(2958)

grossed in excess of \$500,000.

Mr. Raftery: Why don't you give the gross instead of saying in excess of \$600,000.

Mr. Wright: I will read them all into the record if the Court wants to hear them.

Mr. Raftery: No. Just In Which We Serve.

Mr. Wright: In Which We Serve, the top figure is \$1,514,000. Major Barbara at the bottom is \$216,682.74. And I repeat, there are only two on the entire list which grossed more than \$500,000.

Judge Hand: That is a kind of an argument just against bigness, as tending to show monopoly, I suppose.

Mr. Wright: Well, Mr. Montague, as you recall, offered this list of what he called foreign pictures which had been successes in this market. I attempted to show he did not have any knowledge of what they grossed at the time he was on the stand, and this I think confirms the fact.

I shall offer as Exhibit 393 a statement received from RKO as to theatre interests of its officials.

(Marked Government's Exhibit 393.)

Mr. Wright: And I offer as Exhibit 394, a list of franchises made by RKO which was furnished in response to our request for a list of franchises made

Colloquy

with the defendants at any time, which were more than ten years; those made since 1930 which were (2959)

more than five years, and those made since 1935 which were two years or more.

(Marked Government's Exhibit 394.)

Mr. Wright: I shall also offer as Exhibit 394-A a letter from counsel for RKO adding one franchise to that list, and also noting that six of the franchises on the list have been extended through the season 1947-48.

(Marked Government's Exhibit 394-A.)

Mr. Wright: And as Exhibit 394-B, I offer the form of the extension in each case. The date of the extensions is April 22, 1942. That is since the date of the consent decree.

(Marked Government's Exhibit 394-B.)

Mr. Wright: And as Exhibit 394-C, I offer a letter from RKO counsel, setting forth agreements now in force between RKO theatres and Fox, Universal and Columbia, which extend through the 1947-48, 1945-46, and 1946-47 playing seasons respectively, the agreements which were with Universal and Columbia having been executed on January 19, 1942, and January 19, 1944, respectively.

(Marked Government's Exhibit 394-C.)

Mr. Wright: I shall also ask to have marked and offer in evidence as Exhibit 395, a franchise agreement between Fox Film, Keith-Albee-Orpheum Corporation, and RKO Prector Corporation, by their agent RKO Film Booking Corporation, dated August 1, 1934,

Colloquy

(2960)

which relates to the pooling agreements in evidence as Exhibits 200, 201, in which certain RKO theatres were pooled with certain Skopras and Randforce theatres, and these agreements provide that the RKO books for all of the other theatres as well as the RKO theatres.

(Marked Government's Exhibit 395.)

Mr. Wright: And I shall offer in evidence as Exhibit 396 the list of franchises supplied by Loew's Inc. in response to the similar request to that which I just referred to as having been made from RKO.

(Marked Government's Exhibit 396.)

Mr. Davis: May I see that Exhibit 396, Mr. Wright?

Mr. Wright: Yes (handing).

Mr. Davis: You notice, of course, that all those franchises expired. There is nothing there which contradicts the testimony of the witness.

Mr. Raftery: Were those with respect to Loew's as a distributor or Loew's as an exhibitor?

Mr. Davis: Loew's as a distributor.

Mr. Wright: I offer as Exhibit 397 a statement or a stipulation between Paramount and ourselves which reads as follows:

(2961) "Towns in addition to those read into evidence, in which there are no theatres except as indicated other

than those in which Paramount has a direct or indirect financial interest. These towns have a population of less than 25,000 and comprise the balance of the situations in this category in which special agents of the Federal Bureau of Investigation under the

Colloquy

supervision of the Department of Justice conducted a survey. This includes only towns where there was an F. B. I. survey and only as to such of said towns as to which the parties have reached an agreement, as to the facts herein."

Then there is set forth the name of the town, the population, the Paramount theatres, and in each case Paramount has all the theatres in the town except where there is another theatre catering to colored or Mexican patrons, independently operated.

(Marked Government's Exhibit 397).

Mr. Seymour: These stipulations are quite correct but they are all subject to the objection of materiality and relevancy that I think I made when the original list went in.

Mr. Wright: Surely. And I shall offer as Exhibit 398 an additional list of towns in which Paramount has all of the first-run theatres.

(Marked Government's Exhibit 398.)

(2962)

Mr. Wright: I would like to have marked and I offer it it evidence as Exhibit 399, a document which represents the form of agreement used in making the so-called Paramount formula deals with the Paramount affiliates. This agreement, I think, has some special significance. I would like to call the Court's attention to precisely what is in it.

This document has, first, a list of the circuits which are parties to the deal, with a percentage key opposite each one, showing the percentage of the national gross of the feature pictures involved that each of the so-called Paramount partners in the deal is to contribute.

Colloquy

Of course these circuits listed in this first column are in some cases a hundred per cent owned, in some cases only fifty per cent owned, by Paramount.

Then the form of agreement I should like to read your Honors, with your indulgence:

"AGREEMENT made this day of
as of by and between PARA-
MOUNT PICTURES INC. and PARAMOUNT FILM DISTRIB-
UTING CORPORATION (hereinafter collectively referred
to as the 'Distributor'), parties of the first part, and"
—in that case the exhibitor circuit is inserted—
"a corporation, for itself and as
agent for its subsidiary and affiliated corporations
operating the theatres covered by this agreement
(2963)
(hereinafter collectively referred to as the 'Exhibi-
tor'), parties of the second part.

"First: The Distributor, subject to the terms and conditions hereinafter specified, grants to the Exhibitor a limited license under the respective copyrights of the motion pictures licensed hereunder to exhibit in the theatres listed in the annexed Schedule 'A', hereby made a part hereof, for the respective runs designated therein, the feature photoplays which shall be generally released by the Distributors for exhibition in Motion Picture Theatres in the United States during the period commencing September 25, 1942 and ending September 23, 1943"—

Judge Hand: Were they theatres or subsidiary companies of Paramount or were they theatres of the other defendants?

Mr. Wright: The Schedule A attached lists and involves only the theatres of these various affiliates that are listed in this first page. The schedule—

Colloquy

Judge Hand: You did not exactly answer my question. I mean, were they theatres that were subsidiaries of Paramount or in which they had an interest, or were they theatres of the other defendants here that have been spoken of—

Mr. Wright: No.

Judge Hand: Roughly, as affiliates?

(2964)

Mr. Wright: These are all theatres in which Paramount has an interest and, insofar as I know, none of the other defendants is interested in the theatres covered by this agreement. They are, however, for all of the theatres—the theatres listed, of course, include theatres in which Paramount has varying degrees of interest from 100 per cent down to perhaps 15 or 25.

"Second: The term 'run' as used in this agreement shall be deemed to mean any of the following:

"1. The exhibition of one (1) feature photoplay at a single theatre for a consecutive number of days;

"2. The simultaneous exhibition of the same feature photoplay on the same days and dates at two theatres located in the same locality or town, charging the same admission prices, commonly referred to as a 'day and date exhibition';

"3. If after the exhibition of a feature photoplay at one theatre the said feature photoplay is moved over to another theatre within the same town or locality charging the same admission price for a continuous run, the exhibition at both theatres for the purposes of this agreement shall be deemed one run."

I merely call attention to these provisions because under this form of agreement the use and actual num-

Colloquy

(2965)

ber of exhibitions in these theatres on the schedule are left wholly flexible within the determination of the exhibitor and he is not restricted in the number of simultaneous first-runs or such moveovers as he may desire to use in any locality.

Judge Goddard: Does it contain a definition of first-run, whether it is the first time a picture is shown anywhere or first time shown in a certain locality?

Mr. Wright: I take it, clearly, the schedule when it says here, naming the theatres, "Town, Omaha; State, Nebraska; Run, first" means first-run in the City of Omaha; that is, the area is shown in each case with the statement of the run.

Judge Bright: Mr. Wright, isn't that provision about moveover the same as in the ordinary license agreement?

Mr. Wright: I beg your pardon?

Judge Bright: Isn't that provision in that agreement with reference to moveover practically the same as in your individual license agreements?

Mr. Wright: With this exception, here your individual license agreement generally covers or is limited to a particular group of theatres, and here you are extending that privilege of flexibility in runs over the entire country through this.

(2966)

Mr. Seymour: Oh, you are wrong about that, Mr. Wright. Each of these formula deal agreements is made with a particular theatre operating company and relates to the theatres in that locality. This moveover privilege is the same privilege that is given to independent exhibitors who have two houses under common ownership and who charge the same prices

Colloquy

in both houses. I don't think there is any doubt about that.

Mr. Wright: I think, as applied to an agreement of this type, there is a very obvious difference, when you consider what is being shown here in relation to the way the rental is being computed. In the ordinary license agreement you license a specific run or runs in particular theatres and the rental is made dependent on performance in those particular theatres, whether it be on one run or a series of runs, but in this case the exhibitors are given this complete flexibility of this type without any corresponding increase or decrease in license fee burden. Your license fee under this kind of deal is simply an allocation among these circuits of the total film rental burden and when you make a deal of that kind and at the same time give these people complete flexibility, as to how many day and date runs they shall have or how many moveovers shall be had in any particular area, then it seems to me that practice in and of

(2967)

itself is a serious discrimination against a man who is bound to buy and pay for particular runs on the basis of what the picture earned in those runs.

Judge Bright: As I understand it, on this particular agreement that you refer to, the percentage of their rental is based on the national gross, whereas on the ordinary license agreement it is based on the gross of the particular theatre.

Mr. Wright: Yes.

Judge Bright: Might not the payment to be made by one of these circuits be more onerous in those instances than it would be if they had an individual license?

Colloquy

Mr. Wright: That is, I suppose, conceivable, but having been given these unlimited privileges there, without any increase in the license fee being made dependent upon the expansion or extension of that privilege, I think you would normally expect that the privilege would be used in the manner most profitable to the circuit.

Mr. Seymour: You will recall, if I may intrude, Mr. Reagan testified as Judge Bright's question indicates, that Paramount's distribution department considered that this method of getting compensation was better, from the point of view of the distribution department, than any other methods; that they got higher rentals this way. The rental this way is dependent upon the success of each picture.

(2968)

Mr. Caskey: Your Honors will recall in regard to subsidiaries of National Theatres Corporation, that Mr. Reagan specifically testified it was not an apportionment of any burden, but he first of all arrived at a figure which he thought he should get, he then increased that percentage, and then negotiated it out, and he testified categorically that the result which he received was greater than he would have received in any other manner.

In regard to the similar contracts for National, I think that Mr. Wright ought to temper the generality of his language. Take a specific case, Spokane, Washington. You can only have a simultaneous run or a moveover if you have got a theatre that can be operated on the same admission policy as your principal theatre. These contracts relate to two or three or one picture, so it is no privilege to go out and acquire additional theatres because they relate to pictures already made to play in theatres already in existence,

Colloquy

and you are definitely limited in your simultaneous first-run right or your move-over right by the facilities that you have and the number of people you can get to come to your theatres at the same admission price.

Judge Bright: As I understand Mr. Wright's position, it is that because of this liberal provision for (2969)

moveover that, possibly, in a circuit where there are a number of theatres that these exhibitors would so manipulate the picture that they could earn much more than they otherwise could, is that it?

Mr. Wright: That is precisely it, and under an agreement like this without any corresponding increase in film rental.

Mr. Caskey: Yes; but the manipulation, if we may use that word of Mr. Wright's, you book the picture say in Spokane, into the Fox theatre, which is the best theatre in town, and now, if you have got a right to play it simultaneously in some other theatre you first of all have to have the theatre, and that theatre has got to be a theatre of sufficient attractiveness to the public so that people will come to it and pay the identical admission price that they will pay in the Fox theatre, and the same thing applies when you talk about a moveover, you have to move it over some place to a new theatre. So that in each one of these situations you are limited by the actual theatre situation as it exists from time to time, and I repeat the suggestion that I just made, that these are one picture or two picture or five picture deals and they relate to the immediate present and not some situation that may exist in the future.

Mr. Seymour: Of course there is one other observa- (2970)
tion to be made, if I may. This privilege of moveover

Colloquy

being in the agreement, it must be assumed that in negotiating the percentage which was being charged to this particular exhibitor group, the privilege of moveover was taken into account in fixing the percentage so that the distributor got the benefit of the moveover privilege in increased rentals.

Mr. Wright: May I go on with the agreement and show how—

Judge Hand: Yes.

Mr. Wright:—the method operates?

“Third: For the purposes of this agreement the following computation shall be made with respect to each feature photoplay aforesaid.”

That covers all the features released during that season.

“There shall first be determined the sum equal to the total gross income derived by the Distributor from licenses for the exhibition of such feature photoplay in the United States (excluding income from army camps and income under this agreement and income under all similar agreements entered into between the distributor and theatre operating corporations which are directly or indirectly wholly or partly owned subsidiaries of Paramount Pictures, Inc.),”—that is to say, you take out of this preliminary computation the rentals paid by this list of Paramount affiliates

(2971)

who are parties to this kind of deal—“and which sum is hereinafter referred to as ‘Figure X’.” That is, the actual gross less the amount contributed by these affiliates who are parties to deals of this kind and less Army camp income.

“Figure X for such feature photoplay shall then be considered as that percentage of a ‘Base Amount’,

Colloquy

which Base Amount shall be 100%, less the sum of the percents shown in subdivision (a) next below in this agreement and also in all similar agreements entered into for such feature photoplay between the Distributor and theatre operating corporations which directly or indirectly are wholly or partly owned subsidiaries of Paramount Pictures, Inc."

That sum of percents referred to there is the sum of the percentage contribution of each circuit which, in this case adds up to a little more than a total of 20 per cent.

"The amount so ascertained by such a calculation with respect to Figure X is hereinafter referred to as the 'Base Amount'.

(2972)

"For the license herein granted to exhibit such feature photoplay, the Exhibitor agrees to pay as a license fee:

"(a) A sum equal to _____ % of the
Base amount."

And the percentage that is inserted in the blank there is the percentage listed here, that is, for Balaban & Katz that would be 2.45.

Judge Bright: What does that mean, two and a fraction per cent?

Mr. Wright: Yes, 2.45 per cent is the percentage figure for Balaban & Katz. Then there is a similar figure for each one of the circuits making a similar deal.

Judge Bright: Does Balaban & Katz have to pay 2.45 per cent of the gross in all of the theatres in that circuit?

Colloquy

Mr. Wright: No, two and a fraction per cent of the national gross figured according to this rather complex formula, which I will try—

Judge Bright: For all the theatres in that circuit?

Mr. Wright: Yes. What they pay for is the privilege of using the pictures in all the theatres of their circuit which are listed on Schedule A, there attached, on the runs named.

(2973)

Judge Bright: Are the number of times that they can move the picture in that particular circuit specified?

Mr. Wright: No, they are not. All that is specified on Schedule A is a series of runs in certain areas. Under that move-over day and date privilege they may have several first-runs simultaneously in the area or they may have a series of consecutive first-runs. There is no limit in the agreement as to the number of runs that they shall have. The priority is specified in the schedule by assigning to them first-run, or first and second run, or first, second and third, as the case may be, in the particular areas where they operate theatres.

Judge Bright: Are the deals attached to that kind of agreement, which specify the use of the film?

Mr. Wright: No, the deal is simply right here in the payment of, let us say, for Balaban & Katz, of 2.45 per cent of the national gross on the picture for the privilege of exhibiting it in the theatres listed on the schedule on the runs designated on the schedule. That is the deal. Of course, under that system you never have a particular rental for any particular theatre. You never know at any time what the film rental for any theatre in the circuit is. It is a blanket circuit deal.

Let me read further. It gives an example of how this computation is made.

Colloquy

(2974)

"For the license herein granted to exhibit such feature photoplay, the Exhibitor agrees to pay as a license fee:

(a) "A sum equal to % of the Base Amount." And in each case the amount filled in there is the percentage assigned to the circuit that makes the agreement.

"(As an example,"—this I am reading from the agreement here—"As an example, assume that the total gross income derived by the Distributor from licenses for the exhibition of Glass Key in the United States (excluding income excluded as aforesaid)"—that is, after you have excluded what these other circuits pay—"is the sum of \$800,000 (Figure X), and assume that the total of the percentages shown in subdivision (a) above"—that is, the percentage assigned to the various circuits, which in this case totals something more than 20 per cent—"and in the like subdivision in all similar agreements"—

Judge Hand: Where do you get this from?

Mr. Wright: This I am reading from the agreement itself.

Judge Hand: This is from the agreement itself?

Mr. Wright: Yes.

Judge Goddard: Do you happen to have a copy of that agreement?

(2975)

Mr. Wright: This is the only copy I have—that was given to us.

Perhaps I had better start that again.

"(As an example, assume"—and again I am reading—"that the total gross income derived by the Dis-

Colloquy

tributor from licenses for the exhibition of Glass Key in the United States (excluding income excluded as aforesaid), is the sum of \$800,000 (Figure X), and assume that the total of the percentages shown in subdivision (a) above and in the like subdivision in all similar agreements entered into for such picture between the Distributor and theatre operating corporations which directly or indirectly are partly owned subsidiaries of Paramount Pictures Inc. is 20%". Then this is the way the base amount is computed: You take 100/80ths of \$800,000 and get \$1,000,000, your base amount, and then your percentage in the case of Balaban & Katz of 2.45 is applied to \$1,000,000, and your film rental would then be \$24,500.

Judge Bright: What is the reason for the 100/80ths?

Mr. Wright: Well, what they do as a method of adjustment is, in the first instance, you see, they deduct the rentals that the parties to the formula deals pay and your 100/80ths adjustment is to put back into the final figure the amounts that they paid, distributed in accordance with the formula assigning a given percentage to each one.

(296)

The agreement goes on to state:

"Such license fee shall be paid in the following manner:

"(1) Within seven (7) days after the date of general release as fixed by the Distributor in the United States of such feature photoplay, the Distributor shall estimate the Base Amount. The Exhibitor shall pay to the Distributor a sum equal to % of such estimate in equal weekly instalments"—

Colloquy

and again that percentage there is his percentage of the total burden there; Balaban & Katz would be 2.45—

"of 1/17th of such total on the first business day of each consecutive week following the date of general release, the first of which instalments shall be paid on the first business day of the second week of general release of such feature photoplay.

"(2) During the sixteenth week following the date of general release of such feature photoplay, the Distributor shall again estimate the Base Amount (hereinafter sometimes referred to as 'second' estimate), and a committee composed of Charles M. Reagan and Leonard Goldenson shall participate in computing such estimate."

(2977)

"Those are, you will recall, the sales manager and the head of the theatre department of Paramount respectively.

"If the second estimate shall be greater than the first estimate, the Exhibit shall pay simultaneously with the seventeenth instalment payable hereunder a sum representing the difference between the amount payable in accordance with the first estimate and the amount payable in accordance with the second estimate. If the second estimate shall be less than the first estimate, the Distributor shall refund to the Exhibitor such sum representing any excess payment or reduce the amount of the last instalment, as the case may be."

"That is simply a method of adjusting the preliminary payments as they go along playing the picture.

This third paragraph takes care of final adjustments:

"At the end of the eighteenth month following the

Colloquy

date of general release of such feature photoplay, the Comptroller of the Distributor shall make a final computation of the Base Amount, and shall certify such final computation to the Exhibitor. Not later than thirty (30) days after the determination of such final computation, the Exhibitor shall pay any additional sum required to be paid, or the Distributor

(2978)

shall refund to the Exhibitor any excess payment, as the case may be, as the result of such final computation."

I think it is apparent from the terms of the agreement that, of course, in certifying the final computation, not only is the national gross disclosed to each of these circuits, but the percentage allocations and payments made by each of them is disclosed to the other.

The agreement goes on to state—

(2979)

Judge Bright: What harm is there in that?

Mr. Wright: It simply, I think, contradicts this picture of the Paramount affiliates being operated as separate units which are not concerned with each other's film licensing arrangements. Under this kind of deal they are necessarily all parties to the general scheme of allocation and get regular data which shows exactly the extent to which this film rental burden has been distributed among them.

As a matter of fact, I think the one obvious purpose of a deal of this kind is to afford a certain degree of protection to these various partners against film rental discrimination that might be based on the fact that Paramount had a greater interest in one than in the other. Under this system, where each is

Colloquy

allocated a fixed percentage, there is assurance to each, I suppose, that he will not be discriminated against by Paramount in the terms that he finally pays.

Mr. Seymour: All I want to observe is that this arrangement does not contradict to the slightest extent the testimony, which is uncontradicted and unimpeached and undisputed, that the film deals made by these various operating heads of the operating companies in which Paramount is interested with other distributors has no relationship whatever to what those distributors are doing in connection with

(2980)

those theatres. This has nothing whatever to do with that subject.

Mr. Wright: Let me read the next paragraph—

Judge Goddard: Do you contend, Mr. Wright, that a theatre wholly owned by Paramount, say, or one of the affiliates, receives better treatment than a theatre in which Paramount or one of the affiliates has a 25 per cent interest, for instance?

Mr. Wright: Under this kind of a deal I would say pretty clearly they would not. I am just suggesting that one purpose of this kind of arrangement is to satisfy the partner in whom Paramount may have only a 25 per cent interest that the film rental that he will be discriminated against as against some circuit in which Paramount might own 100 per cent, by simply taking the market and allocating it in this way and then paying off on the basis of the allocation instead of the performance in the individual theatres, that you have a completely non-competitive disposition of your rental—

Judge Hand: I really do not think I can sit here and hear an exhibit offered and endless argument about it as it goes on, endless argument and talk.

Colloquy

Mr. Wright: May I just read one—

Judge Hand: It gets so that it illustrates nothing to me and means nothing. Now, I imagine you want (2981)

to have it mean something and to tell me what, but you certainly ought to point it out a great deal better than you do, or else offer it and let it alone.

Mr. Wright: May I then read one more provision and then tell you what I think it shows and drop it?

Judge Hand: All right, go on.

Mr. Wright: This provision—

Judge Hand: But I have been listening to this vague talk about three-quarters of an hour, and the case cannot go on in this way.

Mr. Wright: The succeeding paragraph in this final settlement states:

"If the Distributor shall fail to license such feature photoplay to any representative circuit of theatres, in the United States to which the distributor licensed its 1940-41 season feature photoplays, there shall nevertheless be included in Figure X in the aforesaid final computation such gross income as would have been received from such circuit for such feature photoplay unless any sums received by the distributor from competitive theatres for the same runs of such feature photoplay. For the purposes of this agreement, the term 'representative circuit of theatres' shall mean

(2982)

such circuit of theatres from which the distributor received \$100,000 or more as license fees for the exhibition of its 1940-41 season feature photoplays."

Now, within that definition, if the Court please, are the circuits of theatres operated or affiliated with

Colloquy

the other defendants in this case; and I think it is highly significant that in working out this apportionment of film rental among these circuits in which Paramount is interested, they also take into account the question of what, if any, contribution has been made by all of the other circuits, including those in which the other defendants are interested.

Now, this goes on to say:—

Mr. Proskauer: Does you Honor care to have any comment on that as we go along or would you prefer that we hold our fire?

Judge Hand: Hold it. I do not know what this means.

Mr. Seymour: I should like to state just a word about that, if your Honor pleases. It is a contract involving Paramount, which is in question, and may I just comment so that the record will not have Mr. Wright's comment without any from me. What this provision obviously means is, and what it obviously states is, if on a particular picture any representative

(2983)

circuit does not license the picture—for example, there are many large independent circuits in this country which might not license this particular picture; there are other circuits including those affiliated with defendants which might not license it; and these Paramount companies, these Paramount operating companies, as we have sometimes called them, the theatre-operating companies with whom these agreements are made are not to be let off in their film rental because on a particular picture some other customer of Paramount has chosen not to buy, and therefore the amount that the other customer would have paid goes into the computation so that their rental is larger, and it has not anything to do with the question of affiliation.

Colloquy

Mr. Proskauer: Certainly we have nothing to do with it, these other companies. We know nothing about this.

Mr. Wright: The principal significance it has, so far as the Government is concerned, is that in certain instances in computing a final settlement of film rental it is again necessary to disclose to these exhibitors not only what the other Paramount partners may have paid for Paramount films but what deals were made with the other circuits in which these defendants are interested, as well as any other circuit which

(2984)

may have paid more than \$100,000 in film rentals; and that the computation, the final computation of gross income is to be based or shall be determined by a majority of a committee consisting of—and that space is left blank, and we have asked to have the names of the committee involved, but I do not believe we have yet got them.

• Could we have those now?

Mr. Seymour: I shall be glad to furnish them to you now if you like.

Mr. Wright: Why don't we have those names put in now?

Mr. Seymour: The names of the committee originally included in the agreements were Barney Balaban, Y. Frank Freeman, Neil Agnew, Austin C. Keough, Leonard Goldenson, Charles Reagan, Samuel I. Pinanski, Earl Hoblitzelle, R. B. Wilby and A. H. Blank. Neil Agnew, of course, is no longer a member of such a committee because he has been out of Paramount for some months.

Mr. Wright: We will offer the exhibit as—

Mr. Seymour: Have you made it clear, Mr. Wright, in connection with that offer that those lists

Colloquy

of theatres are the lists annexed to the various agreements? They are not all annexed to one agreement. I do not know that you made that clear.

(2985)

Judge Bright: List of theatres or list of circuits?

Mr. Seymour: No. There is, I understand, in the exhibit a list of circuits, so-called circuits, which is annexed to the document. The document is a form which was made originally with those various theatre operating companies which Mr. Wright has called circuits, and in addition we have furnished to the Government and the Government is now offering the list of theatres in each operating company which was annexed to the agreement as actually executed with that operating company. In other words, this is both a particular agreement, and all the exhibits annexed to all the agreements. They were not all annexed to one isn't that correct, Mr. Wright?

Mr. Wright: That is what I understand as to the theatre lists. However, it is my understanding that the first page of that exhibit setting forth the various parties and percentages is annexed to each.

Mr. Seymour: No, you are wrong about that, Mr. Wright. The top sheet, as I understand it, is a list prepared for your convenience of the companies with whom the formula deal was made—

Judge Hand: Now what in the world is this talk about? Here are two people arguing about what an exhibit shows, and one says it shows one thing and

(2986)

the other says it shows another. When you get all through with this talk what are we to think? We have got to look at the exhibit, I should think. I cannot have the thing go on this way.

Colloquy

Mr. Seymour: You are quite right, your Honors. Mr. Wright I did not think made plain what the contents of the exhibit was.

Judge Hand: And you tried to ask him something and he does not give a direct answer, and then the thing gets all mixed up. We are not just floating down the river.

Mr. Seymour: Well, let me state it, and then if there is any correction, let Mr. Wright make it, and that will be the description of the exhibit, because otherwise we will have a very confused record for your Honors.

The top sheet on the exhibit is a list of the theatre-operating companies with which formula deals were made and the percentage included in the several formula deal agreements with those several companies. The next part of the exhibit is a typical or a form of the formula deal agreement which was made with those many companies; and finally there are annexed lists of theatres which were taken from the various formula deal agreements with those various companies. One of those lists—that is, the theatres in a particular

(2987)

company was annexed to the particular formula deal of that company. They were not all annexed to one formula deal agreement made with all the companies as a part of one agreement.

Isn't that correct, Mr. Wright?

Mr. Wright: You gave it to us. I accept your statement as to what the fact is.

(Marked Government's Exhibit 399.)

Mr. Wright: I will ask to have marked as Exhibit 400 a tabulation that was furnished to me by counsel for Warner in explanation of the exhibit which was

Colloquy

offered in evidence here the other day as W-13. That was the statement which was put in purporting to show that the Warner domestic distribution and production business was operated at a loss except for the last two years. It was given to me with the statement that "We trust that you will keep this schedule confidential since it contains data which has never been disclosed."

Now, we have no desire to disclose it to other defendants. We do wish to disclose it to the Court.

Mr. Proskauer: Who sent you that? May I see the schedules?

(Papers handed to Mr. Proskauer.)

(2988) Mr. Proskauer: Well, I do not know that I have

any power to keep Mr. Wright from offering it. The incident was when I put in a schedule, he asked me whether I would write him a letter showing how it was made, and I said he would have it before sundown on Saturday. He called me later and said he had not received it. It had been mailed Friday night. What I supposed I was giving Mr. Wright was the detail in that statement to enable him to check the accuracy of the schedule which was put in evidence. Why he wants to put this in, in view of that situation, I don't know. He is perfectly entitled to comment and make any correction in our statement.

Do you claim that this in any way impugns the accuracy of the statement offered in evidence?

Mr. Wright: It simply explains how it was computed, and that we think is significant.

Mr. Proskauer: How? With your Honor's permission, what is the significance of it?

Mr. Wright: If the Court please, you will recall that the Exhibit W-13 showed a series of red figures

Colloquy

here which were supposed to be losses on U. S. A. production and distribution divisions in the years 1937 through 1942 inclusive. It shows profits only in 1943, 1944, for those divisions. Now, the manner in which that loss was arrived at is this: They first took

(2989)

the profit from the theatre divisions; then took the profit from the foreign division, including Canada, and then deducted those from profits before taxes and arrived at an alleged loss on the domestic U. S. A. production and distribution division.

Mr. Proskauer: That is right.

Mr. Wright: However, there is a footnote in each case which I think explains the accounting sleight-of-hand by which these results were achieved. The profit from foreign division, including Canada, is stated to be before intercompany film royalties payable for American-made pictures. That is without deducting anything for payments to the American company which produced and made the pictures on which the profit was earned. Then the footnote on the losses, the alleged losses in the U.S.A. production and distribution divisions says, "Before foreign intercompany film royalties receivable for American-made pictures." So that again that figure does not include what was paid on account of American production by the foreign distribution.

Mr. Proskauer: I will make a quick suggestion. Why don't you put in the two explanatory footnotes which are the things which you say show some sleight-of-hand? I am a pretty good accountant, I think, and I say they don't show any sleight-of-hand at all.

(2990)

Mr. Wright: As far as—

Mr. Proskauer: Put them in and let us argue it.

Colloquy

Mr. Wright: We desire to offer the exhibit in this form because it also shows separately the profits from the theatre division, and I think——

Mr. Proskauer: I withdraw all objection to it. Let him mark it.

Mr. Wright:——the fact that the profits from the theatre division in 1944 were six times what they were in 1940, operating the same number of theatres I think tends to rebut the situation made in figures which were offered——

Mr. Proskauer: Your Honors, can't I end this by withdrawing all objection to it and suggesting that he offer it, and challenging him to make good on his statement about accounting sleight-of-hand?

Judge Hand: It is admitted.

(Marked Government's Exhibit 400.)

Mr. Wright: I will ask to have marked with the next two exhibit numbers these two United Artists contracts, 401 is one with the Robb & Rowley Circuit for Stage Door Canteen. The other is for the Roxy Theatre at San Angelo, Texas, with an independent exhibitor named W. V. Atwell.

(2991)

Mr. Raftery: Is this rebuttal, Mr. Wright?

Mr. Wright: Yes, it is.

Mr. Raftery: Of what?

Judge Hand: That is a question of terminology. Go ahead, Mr. Wright. Proceed.

(Marked Government's Exhibits 401 and 402.)

Mr. Raftery: Is this part of what you got Monday?

Mr. Wright: Yes.

Colloquy

Mr. Raftery: I have got another bundle here that you asked for yesterday, whenever you want it.

Mr. Wright: Now, I simply want to call your Honor's attention to what is in them and the purpose of the offer. The circuit deal with Robb & Rowley for Stage Door Canteen marked in evidence as 401 shows the payment of the following flat rental license fees for the following runs in San Angelo: The first-run at the Ritz, \$50; second-run at the Plaza, \$30; third-run at the Angelos, \$15; fourth-run at the Lyric, \$12.50.

Mr. Raftery: What is the date of that contract?

Mr. Wright: That is dated May 1943.

Judge Hand: Where are these runs?

Mr. Wright: In San Angelo, Texas.

(2992)

Mr. Raftery: This circuit, by the way, is not a party to this action in any respect. It is an independent circuit.

Mr. Wright: The contract with the independent exhibitor operating the Roxy, the same picture, fifth-run—it says run, fifth, available 120 days after first-run, is \$20 against 35 per cent of the gross. The guarantee is more than the circuit paid for either of the two preceding runs, and the percentage is included, which was not in any of the deals for the preceding runs.

Judge Bright: In the same town?

Mr. Wright: Yes, those are all in San Angelo.

Mr. Proskauer: The circuit was a non-affiliated circuit. Is that clear?

Mr. Wright: Well, the extent of the affiliation appears in the record. It is a circuit in which the United Artists Theatre Circuit owns a half interest, and which, in turn, is one in which Mr. Joseph

Colloquy

Schentk is interested; but for our purposes I do not think it makes any particular difference on this question of discrimination between the independent circuits.

Mr. Raftery: What is the discrimination, Mr. Wright? That is what I am trying to find out.

Mr. Wright: I think there is a very obvious film rental discrimination in that situation.

(2993)

Judge Bright: You mean the fifth run man pays more than the third and fourth?

Mr. Wright: Yes, sir.

Mr. Raftery: We contend all through we have got a perfect right to do it. There is no exhibitor here complaining. If the exhibitor has a complaint why isn't he brought here? They just throw the contracts in; we do not know the type of theatre; we do not know any of the circumstances. It is de minimis. That picture, according to the record, grossed four million dollars in the United States; and he comes in here with a \$20 thing; and, we submit, it may be competent for some reason, but he is just attempting to burden the Court with a lot of misleading de minimis.

(2994)

Mr. Proskauer: Your Honor, the record in this case already shows that in numbers of cases independent theatres having a prior run paid less than subsequent theatres both percentagewise and in money. There is no criterion by which—and we shall argue this at length, your Honors; I am referring to it because Judge Bright has raised this question several times; this is not the time to do it in detail; but I want to register the caveat that there are many instances in which subsequent-run theatres are much

Colloquy

more profitable than prior-run theatres; can afford to pay a larger percentage rental; can afford to pay a larger lump sum rental; and that that situation does not turn on whether it is an affiliated or non-affiliated theatre; and we shall develop that in argument.

Mr. Wright: Now, if the Court please, I would like to say what we have attempted to do on this rental discrimination question. We took 26 theatres as to which there was material in evidence because they had been involved in the Appeal Board decisions where there were findings to the effect that the circuit theatres in—certain of these circuit theatres and the independent complainants' were comparable theatres, and there is, of course, a description of the theatre situation as it exists in the town in question; and we subpoenaed, or we asked by letter each of the defendants to produce the contracts made with those par-

(2995)

ticular theatres for two seasons, I believe the 1943-1944 and the 1944-1945 seasons. Now, those letters went out on November 3rd. The only companies that we have received the contract data from are United Artists and Universal, and as to those, as to United Artists, the one we received was so incomplete, that the only contracts which were furnished where the same picture was licensed to the independent opposition and the circuit theatre, were those which I have just offered.

Now, as I say, from the others, from six of them we have received none of the data, and we cannot go ahead with this film rental discrimination rebuttal until that material is in our hands. I had hoped that it would be available in time to put in today when I suggested that we reconvene today instead of later.

Colloquy

But judging from what has occurred, I now feel that we cannot complete that showing until some time next week, and we have some other data that we can put in this afternoon, but I would suggest a week's adjournment from today so that we might have that time to assemble this material we have asked for, and then I think we can put it in very quickly. But rather than attempt to struggle along here, getting material piecemeal and then offering it——

Judge Goddard: Mr. Wright, has anyone complained about that, any of the parties?

(2996)

Mr. Wright: You have before you——

Judge Goddard: Will you answer that yes or no? I want to make my question just as simple as possible. I want to know if either of the parties complained of that.

Mr. Wright: Not only this independent exhibitor but every independent exhibitor in the business complains bitterly about what we say is a well-established fact that there is discrimination in rental terms between the licenses made with independents——

Judge Goddard: I want to repeat my question, because I am going to try to get an answer.

Mr. Wright: Surely.

Judge Goddard: Did either of the parties to that contract complain about it?

Mr. Wright: Yes. I say that every independent exhibitor who is in opposition to a circuit complains that he is discriminated against in rental terms on the deals he makes and those that the circuit make. Now, prior to the time that these sales representatives took the stand here and said that there was no discrimination, these defendants had also taken the position that Mr. Raftery just now takes, that they

Colloquy

have a perfect right to discriminate against anyone and everyone in any way that they please; and that if that were the position now we won't spend time on this. But in view of the effort that has been made,

(2997)

it seems to me to mislead the Court as to what is the well established and known industry fact, that is, that your small exhibitor is constantly discriminated against in rental terms. I have felt bound to make additional license contract offers of this kind, and I submit that the question of discrimination would not be aided by calling someone to the witness stand and having him complain. The discrimination is shown by what was done and not by who may yell the loudest.

Mr. Raftery: If your Honor please, may I answer your question directly?

Judge Goddard: I should like to have an answer.

Mr. Raftery: We had no complaints on that contract. Secondly, Universal and United Artists have given Mr. Wright every document in our possession that he has asked for, with the exception of the latest which he asked for late yesterday, and here is another bundle (handing).

Now, Universal and United testified—first we put our distribution contracts in as to United. Our obligation is to get the most from every exhibitor we can get regardless of race, creed or color or affiliation. That is our obligation to our producer. And that contract goes back to him for rejection or approval. We do not have the final say. Mr. Scully says he tries to sell all his pictures on the highest terms, and each ne-

(2998)

gotiation is separate. Now, the fact that you are able to get \$20 from an account, you are getting down to pretty near the last available dollar, because when you

Colloquy

get down to the twenties—we have one producer, by the way, who won't let us sell any exhibitor who pays less than \$35. I suppose Mr. Wright says that is discrimination, but that man only makes one picture every five years, so we only have that headache once in five years. We contend we have a right to get as much as we possibly can from each account. We are selling him an intangible. We are not selling cotton shirts or even Bobbs Merrill books. We have that intangible, an exhibition right, a performing right, and that is all we license, and we say under the Interstate case, Justice Stone said that each of us acting separately and independently can exercise our monopoly of copyright in any way we see fit. Now, that is said in the prevailing opinion, Mr. Wright to the contrary notwithstanding. He said it both as to Paramount in its relations with Jefferson, and he said it as to all eight of us who were found guilty of conspiracy because of that O'Donnell letter. He said that if we had acted separately and independently we could have put either of the restrictions in the contract, but we did not. We acted as a result of the pressure of the O'Donnell letter. When he got to the Paramount Jef-

(2999)

erson subsidiary, which Mr. Wright says is price-fixing and discrimination, he said Paramount could have done it separately, but they did it not by virtue of the ownership of the copyright, they did it by virtue of the pressure of the exhibitor who had no interest in the copyright.

Now, we say loading the record with this sort of evidence does not help the Court in any respect in the issues involved as regards distributors as distinguished from exhibitors. We make no claim here

Colloquy

that we charge any man less than his competitor or more. We get all we can from every one of them. And just because Robb & Rowley did not pay as much as Mr. Wright thinks they should pay, that is the best we could get out of him.

Mr. Proskauer: Your Honor, I have no objection to the evidence, but we are not a public utility, and we have got a right to license our pictures as we please so long as we do not do it by conspiracy; and that is what the essence of this case is coming down to. While I have no objection to the evidence, I challenge the right of a quasi-judicial officer to come in here and say that every independent exhibitor is objecting to this thing. There is no such situation existing.

Mr. Frohlich: May I, if your Honor please, take an objection—I do object to this line of evidence

(3000)

offered by Mr. Wright. He has failed to make out a case, an affirmative case against at least these three defendants at this table. He now seeks afresh to make out a case against them on so-called rebuttal. Now, we brought our witnesses down. We tendered an issue to the Court. Mr. Wright is not trying to rebut evidence that we produced here; he is trying now for the first time to show some form of discrimination which he failed to show on his main case; and, technically, I think he is violating the rules of evidence, and I technically object, strenuously, to every attempt by Mr. Wright to follow this line of evidence.

Judge Hand: Overruled.

Mr. Davis: I should like to p. in an objection against the receipt of this evidence against Loew's, Inc., which is not a party to these exhibits.

Judge Hand: Overruled.

Colloquy

Mr. Proskauer: I suppose we all have that general objection all the time?

Judge Hand: Yes.

Now, what about these anticipated exhibits or wandering exhibits that Mr. Wright is talking about?

Mr. Davis: We were asked to exhume certain contracts. We have exhumed them and are ready to turn them over to Mr. Wright.

(3001)

We got our request yesterday at 2 o'clock, quite a lengthy request, and we have not found it possible in the intervening hours to have it together, but we hope to have it in time to serve Mr. Wright's purposes. We cannot produce exhibits as if you drop a nickle in the slot.

Mr. Caskey: If your Honor please, I think the question is much more serious than has been indicated. If we are going into any show of discrimination in film rentals in the selected situations that are dealt with in the Appeal Board decisions which were admitted provisionally, it may require the framing of a completely new issue. Now, I should not suppose that any of these defendants would want to rest the case on any such basis or any such narrow selection, and if there is going to be any attempt to show in isolated contracts without any oral testimony, without any complaint, without any proof as to what the effect of the film rental was on the theatre, no more proof except that some man paid 10 cents for coffee and another man paid 5 cents, of course——

Judge Hand: Have you got your papers here?

Mr. Caskey: No, sir. Our letter came yesterday afternoon at 4 o'clock. That is when we got it.

Colloquy

Mr. Wright: I think there were two letters. The one that came yesterday was the repeat request. The
(3002) original was sent out on November 3rd.

Mr. Proskauer: Mine was not a repeat request. I got it at 3 o'clock yesterday. It was a request for some more information. We spend half our time trying to meet Government requests that come to us in letters in a form threatening subpoenas if we do not comply. We will give him all he has called for in the letter we got at 3 o'clock yesterday afternoon before sunset tomorrow.

Judge Bright: Have you any other rebuttal now, Mr. Wright?

Mr. Raftery: Excuse me. Here is another one I just found.

Judge Bright: Is there anything further now?

Mr. Wright: I think we can go ahead this afternoon. I wanted to put in some profit figures through an FBI agent who made an examination of the data on file with the Securities and Exchange Commission. Now, we can go ahead with that.

Judge Bright: With the exception of this additional information which you have just requested of the defendants, is that the end of the rebuttal?

Mr. Wright: Our rebuttal will also include a statement or an examination of our statistician who has been tabulating not only our material but examining the data that has been pushed in here today and recently, and charts and figures, and we shall examine
(3003)

him not only with respect to computations of his own but certain data which has been offered by the defendants; and with that plus the introduction of documentary material, that I think will complete our re-

Colloquy

buttal; and I do not think the time of presentation will be great, but we have not been able to get the statistician ready to testify because of these constant changes that have been made in the data he has been tabulating. He has to recompute every time one of these changes comes in; and, of course, as to the material which has come in, he has not even had a chance to look at it or examine it.

(3004)

Mr. Leisure: If the Court please, we received a letter from Mr. Wright yesterday at eleven o'clock, and working yesterday afternoon and last night we have the material, but if Mr. Wright is not going ahead—they are original documents and we would like the privilege of photostating them before we turn them over to him, if that is satisfactory to Mr. Wright.

Judge Hand: Well, I do not see why you did not give them notice long ago of this thing. You say you gave them all notice November 3rd?

Mr. Wright: We sent out that letter that I referred to here covering the 26 theatres on November 3rd, to each counsel for each distributor.

Mr. Caskey: Mr. Wright, have you got a copy of such a letter?

Mr. Wright: Yes, I think we have.

Mr. Caskey: I would like to see it. I have not gotten it.

Mr. Wright: Here is the form of the letter (handing).

Mr. Frohlich: We never got that letter, you know, Mr. Wright. You never sent it to us.

Mr. Rastery: So that the record will be straight as to what I have given you——

Mr. Wright: What?

Colloquy

(3005)

Mr. Raftery: I want the record to show what I have given you, because you have intimated that I did not give you everything. Under date of November 12th there was sent by mail to Universal a request for certain documents.

Judge Hand: Did you get a request on the 3rd?

Mr. Raftery: I gave him that stuff long ago, whatever he asked for. The big bundle——

Judge Hand: You mean he wanted more?

Mr. Raftery: Yes. This is the 12th.

Judge Hand: I see no reason why you did not have this thing out. You knew this case was marching along——

Mr. Wright: I said——

Judge Hand: Now wait a minute, please. This is rebuttal, you say, to show specific discrimination. Why didn't you ask them for it and get it before?

Mr. Wright: If the Court please, we did not know until the witnesses took the stand that the claim was going to be made that they did not discriminate as to film rentals in dealing with independents and circuits.

Judge Hand: I am surprised at that statement on your part, that you did not know their defense by this time or that that was one of their defenses.

Mr. Wright: We did send out the letter on November 3rd, and Mr. Raftery got the letter, and I did

(3006)

not say that he had not or that United Artists had not produced material. United Artists and Universal did produce material. It was the other six that produced none.

Judge Hand: Did you send it to them?

Colloquy

Mr. Wright: My understanding is that the same letter was sent out to counsel for each of the eight companies.

Mr. Proskauer: Your letter of yesterday repeated the letter of November 3rd, but added a mass of additional information you wanted.

Mr. Caskey: I have the letter. Let me read it. It relates to eight cities, not 23.

Mr. Wright: I said 23 theatres.

Mr. Caskey: All right, in eight cities. It says:

"Enclosed is a list of documents which we may desire to use in the presentation of rebuttal evidence in the above case. If you desire the issuance of a subpoena as a condition for their production, we shall appreciate your letting us know promptly."

Now those for those eight cities are available. Now yesterday there came the additional letter.

Mr. Raftery: I got two letters, and this is what I produced, Mr. Wright: On November 12th you asked for license agreements for Middleboro, Massachusetts, Brockton, and you also asked for the Playhouse,

(3007)

Ayer, the clearance, 1937-38 form of license agreement.

Now we have produced all we have got. We did not sell Brockton in any of those years, so we have no Brockton. We did not sell either of the theatres in Lowell, the Strand or the Merriman, so we have nothing for Lowell. We have produced Ayer, and at two o'clock the boy will be here with the additional back season stuff for Middleboro. Now this morning we get a letter of November 13th, and he wants the license for the Plaza theatre at Atlanta, for the exhibition of Stage Door Canteen. We phoned for that this morning as soon as we got it.

Colloquy

Judge Hand: Where is that?

Mr. Raftery: Plaza theatre, Atlanta. I don't even know the theatre. The other—

Judge Hand: Well, I am not going to see this thing go on as an examination before trial here during trial. This case has got to proceed, and we are not going to tie up three Judges here in trial to suit the convenience of anybody.

Why do you keep serving them with these papers?

Mr. Wright: If the Court please, that is the only way that we can assemble the data. We either give them the letter or serve them with a subpoena.

Judge Hand: I am not talking about that. I am talking about the late date at which it is done.

(3008)

Mr. Wright: Some of this matter—those two theatres he just referred to—was testimony which was developed in the course of cross-examination of defense witnesses about this question of whether or not certain of the distributors adhere to the same clearance as that granted by others.

If the Court please, the only way I know to resolve those questions is by the production of the agreements themselves, and we want to produce and offer the material as fast as we can get it, but it has not been possible to get out one letter which would cover everything. As we have checked the record there have been other agreements that we have decided that we would want. As we have made that check we have notified these people as to what was wanted. I want to proceed as expeditiously as we can, but I cannot do it without that material. I will say this—

Judge Hand: You have got to go to your limit, apparently, now. Why don't you go on with it?

James J. Maloney—By Plaintiff—Direct

Mr. Wright: I haven't even had a chance to examine it or look at it. I say, we could stop and examine—

Judge Hand: I have constantly told you to deal with each other across the table and not come into court in this way. You have had four days here.

(3009) Mr. Wright: If the Court please, there was no one available, I think, insofar as the defendants' offices were concerned, either on Saturday or on Monday.

Mr. Raftery: We were there all day.

Judge Hand: We will have to determine on some method of procedure now.

Mr. Wright: I say I can go ahead this afternoon with this summary of this SEC material, I propose to get that out of the way, but I am pointing out that I simply haven't been able to—Mr. Borwick hasn't been able to get his material ready simply because there has been no time for him to recompute this material and to actually examine the material which has gone in as a part of the defense, some of which has just been put in here now.

Judge Hand: We will adjourn until two o'clock.

(Recess until 2:00 p.m.)

(3010)

AFTERNOON SESSION

Judge Hand: Proceed.

Mr. Wright: Mr. Maloney.

JAMES J. MALONEY, called as a witness on behalf of the Government in rebuttal, being first duly sworn, testified as follows:

*James J. Maloney—By Plaintiff—Direct**Direct Examination by Mr. Wright:*

Q. Where do you live, Mr. Maloney? A. New York City.

Q. And what is your occupation? A. I am a special agent, Federal Bureau of Investigation.

Q. You are also an accountant? A. That is correct, sir.

Mr. Proskauer: Mr. Wright, try to let us hear you, won't you?

Q. You participated, did you, in an examination of certain data filed with the Securities and Exchange Commission at the request of the Antitrust Division of the Justice Department? A. Yes, I did.

Q. The material examined was the statements, the financial statements, filed by seven of the defendants in this case? A. That is correct.

Mr. Wright: Will you mark this for identification.

(Marked Government's Exhibit 403 for identification.)

Q. I will show you this work sheet that has been marked for identification as Exhibit 403—

Mr. Seymour: May we have copies, Mr. Wright?
(3011)

Mr. Wright: Yes, but I am not sure that there are enough to go around.

Q. Now can you tell us what that exhibit that you have in your hand is? A. Yes. The amounts appearing on this exhibit which is entitled "Warner Bros. Pictures, Inc. Statement of Profit and Loss,"—the amounts appearing on this tabulation were obtained from the annual statements filed with the Securities and Exchange Commission, or, rather,

James J. Maloney—By Plaintiff—Direct

from copies of those statements which are on file at the New York Stock Exchange.

Mr. Proskauer: Mr. Wright, we won't make any question but what this is a collation of our reports on our profits made to the SEC. I do not know what the purpose of it is. We never claimed we were doing business at a loss.

Mr. Wright: We offer the exhibit in evidence.

Mr. Davis: Isn't it proper, your Honors, that they should say for what purpose this exhibit is offered? We have seen a quantity of exhibits go in without any knowledge of their relevancy. I think the time has come now that we should ask what the relevancy of these exhibits is to the case.

Judge Hand: Yes.

Mr. Wright: If the Court please, Warners offer testimony both as to certain rising costs, and then

(3012)

some other figures to the effect that certain domestic operations were unprofitable, and figures which, as I understood Mr. Proskauer's statement when they went in, were entitled to show that Warner Bros. Pictures, Inc., had absorbed these increases in cost and had not passed along to the public these increases.

Now this statement is offered to show that the profits after taxes of Warner Bros. Pictures since 1940 have increased very greatly, that these figures show not only that increases in cost have not been passed on, but that such savings as may occur from the integration of these businesses far from being passed on to the public have resulted in exorbitant and excessive profits to this defendant.

Mr. Proskauer: As I said, we do not want you to be put to the proof of the authenticity of the figures.

James J. Maloney—By Plaintiff—Direct

We are taking them subject to check and correction as far as we are concerned, your Honors. But what I am at a loss to know is how a statement of what our overall profit is in any way negatives the specific testimony we gave as to a breakdown of those profits or in any way tends to negative the evidence we gave that while our costs have gone up very remarkably, our admission prices have remained about static. What relation is there between the two things?

Judge Hand: I do not see myself.

(3012-A)

Judge Goddard: This includes foreign and domestic, does it not?

Mr. Wright: This is the consolidated statement of Warner Bros. Pictures. This includes the parent and all subsidiaries.

Judge Hand: Go ahead.

(3013)

Judge Bright: You say this is after taxes?

Mr. Wright: The net profit figures are after taxes.

Judge Bright: The statement does not show that.

Q. Is that correct, Mr. Maloney? A. Correct, the statement merely indicates that it is net profit.

Q. Did you make an examination with regard to the taxes paid by the same company since the excess profits tax has been in effect? A. The amounts of such taxes were obtained from the statements on file—

Q. Have you got a statement of those there? A. Yes, I have.

Q. Will you just—

Mr. Proskauer: Your Honors will find that this statement does not jibe with the one that was put

James J. Maloney—By Plaintiff—Direct

in this morning. The reason for that is that the one that was put in this morning was before taxes; and this one is after taxes.

Judge Hand: Now he is going to prove taxes.

Judge Bright: To testify to excess profits taxes.

Mr. Proskauer: I mean, federal profit taxes and income tax.

Q. Will you just read the data you have there, taken from the Securities and Exchange Commission reports, which show the extent of the excess profits taxes paid by this company? A. Yes. The amounts of excess profits taxes (3014)

applied only for the years 1941, 1942, 1943 and 1944. For those years the amounts were, for 1941, \$7,150; for 1942, \$4,000,000; for 1943, \$9,990,000; for 1944, \$9,135,000.

Judge Hand: Do you claim their rates were any higher during these times?

Mr. Wright: Oh, yes, indeed, if the Court please. The only way in which profits of this character could have been earned while the operation of the theatres remained at the same level, in number, would be by an increase in margin.

Judge Hand: I did not say anything about them remaining the same level in numbers. I don't know whether they did or not. I asked you whether you claim their charges were any more.

Mr. Wright: Yes, we do.

Mr. Proskauer: I have only to observe that there is no proof of that. The only proof in the case is what I put in.

Judge Bright: Do you mean by "charges were more" that the cost to the public was increased?

Mr. Wright: Yes, indeed.

Judge Bright: In what respect?

Colloquy

Mr. Wright: Admission prices .

Judge Bright: Doesn't the proof showed the ad-

(3015)

mission prices stayed about static during this period?

Mr. Wright: I do not believe that it does. What he offered was not a study of what had happened to admission prices; he merely took a net figure of so many admissions taken in, divided by the total number of people who attended theatres. I submit that that kind of an average does not give you any accurate picture at all as to what happened to the admission price level, and that these figures, and the figures we offered before, as to theatre operations show that—there is also in evidence that the number of theatres throughout this period, the number and character and location of theatres operated by Warner throughout this period, has remained substantially constant. Now, the only way, as I see it, in which you can account for the enormous rise in profits that occurred, and the excess profits that were earned is by increases in your margin between what was charged to the public and what it cost you to give what the public got. That is what these figures do.

Judge Hand: I do not see how that follows in the least. It may be a fact, but I do not see how it follows from that.

Mr. Proskauer: May I state that the evidence in this case shows the explanation, and that is, the enormous increase in attendances in theatres during the war period. The criticism of my figures is just base-

(3016)

less. I showed the average admission price in all theatres in the country, of ours, for a 15-year period. How to get it more fairly than to take the gross ad-

Colloquy

mission and divide it by the admissions to get the admission price, I don't know.

Judge Hand: How it proves anything but proves that people took in a great deal more money, or made a great deal more money, except possibly as some kind of a link in something else, I cannot imagine. That is why I am afraid to exclude it because it may be some kind of a link. I tell you it proves nothing in itself.

Mr. Wright: If the Court please, we would not have offered it had defendants not sought to go into the profit situation. In our view, in the first instance, the question of whether or not there has been a restraint here is not dependent upon a consideration of these—

Judge Hand: Now you are making an entirely different argument, if I understand you. You are trying to meet something else, you say, that they have gone into, which is, that they haven't—they have had a hard time and they wouldn't have got on without these arrangements, and now you say you meet that by proof that they earned a lot of money. Maybe it is so, and maybe their argument is no defense whatever to the suit for violation of the Sherman Act. I shouldn't wonder if both were true.

(3017)

Judge Goddard: Wouldn't the attendance figure throw some light on this?

Mr. Wright: Why, the attendance figures are in there, yes. I would submit that, regardless of whether or not your increase in margin is due to increased attendance or increase in admission price level, in either case it is perfectly apparent from the figures that we offer that the public absorbed your increased costs and that Warner Bros. operated with an excessive margin, as shown by the payments that were made.

Colloquy

Judge Hand: You mean you are now coming to some kind of argument like this, I should say—I don't know—that if they made more money, they should have reduced their rates?

Mr. Wright: If they had been in a competitive industry, that is—

Judge Hand: In other words, you do not show at all that their rates were raised by reason of conspiracy or anything else. You say they made so much money, that they should have lowered their rates.

Mr. Wright: That profits of this character—

Judge Hand: You see, this thing, well, it is like the old lines of Sir Edwin Arnold in "The Light of Asia,"

"They flash and vanish

(3018)

Bid them not to stay

For knowledge brightens as they flee away."

These things just come across the screen and hit us with a new thought.

• Mr. Wright: Let me say this, profits of this character could not have been earned under a competitive rate structure. That is the fundamental fact, I think, that emerges from these figures.

• Judge Goddard: Mr. Wright, do the figures of the other affiliates and the independents also show an increase in profits during these years?

Mr. Wright: Yes. I was going to offer a similar statement for each of the other six defendants—

Judge Goddard: For the independents?

Mr. Wright: (Continuing) —which filed with the Exchange.

We have no profit data on independent exhibitors generally. I would assume that there may also have been substantial increases in profit there due to increased prosperity. However, they aren't—

James J. Maloney—By Plaintiff—Preliminary Cross

Judge Hand: There you would argue that they would make them because of the conventional example of the confederates here, and, therefore, they charged more, otherwise they would have lowered them. Well, go on.

(3019)

Judge Bright: You offered that, did you not?

Mr. Wright: Yes, we offered it.

(Marked Government's Exhibit 403.)

Mr. Wright: I will ask to have this next work sheet marked as Exhibit 404 for identification.

(Marked Government's Exhibit 404 for identification.)

Q. Mr. Maloney, could you explain what that Exhibit 404 for identification, which you have in your hand, is? A. This exhibit, which is entitled "Twentieth Century-Fox Film Corporation and Wholly Owned Subsidiaries, Analysis of Income," reflects amounts of income and net profit, which were obtained from copies of the annual statements filed with the SEC, which copies are on file at the library of the New York Stock Exchange. It covers the period from 1934 to 1944.

Mr. Caskey: I want to examine on the voir dire before this is taken.

Mr. Wright: Go ahead.

Preliminary Cross-Examination by Mr. Caskey:

Q. Mr. Maloney, did you prepare this statement yourself? A. No, I did not, sir.

Q. You did not prepare it yourself? A. That is correct.

Q. Did you examine the basic data yourself? A. I did

(3020)
not examine them in detail: I observed them.

James J. Maloney—By Plaintiff—Preliminary Cross

Q. Did you check this document against a basic data yourself? A. No, I did not.

Q. Do you know whether this statement, gross income from sales and rentals of film and accessories, is true or not? A. I know, sir, that it was prepared under my observation.

Q. Do you know it to be a fact that the amount of film rental for the year December 25, 1943, increased \$90,000,000 over the previous year? A. Because the statement was prepared under my observation, I—

Q. You know that to be true? A. I know that the work of the man preparing it was accurate and to that extent I know that it is true.

Q. Don't you know that in fact in July, 1943, Fox Film acquired all the capital stock of National Theatres Corporation? You know that to be a fact? A. I believe you when you state it. I never heard it before in my life.

Q. Don't you know that for the year ended 1943 and the year ended 1944, in accordance with the requirements of the Securities and Exchange Commission a consolidated report was filed, lumping theatre admissions and film rental for those last two years? A. As stated before, when you tell it to me, I believe you. I do not know it to be a fact otherwise. (3021)

Q. You do not make any representation to this Court that you testify that the film rentals of National Theatres Corporation increased from \$67,000,000 to \$154,000,000 from 1942 to 1943, do you?

Mr. Wright: Excuse me. Just a minute. Let me say this, if the Court please: If there is any question as to the authenticity or accuracy of any figure that is on here, I will withdraw the exhibit so that a proper correction can be made. There is no desire to have anything in here, on the part of either of us,

James J. Maloney—By Plaintiff—Direct

which does not correctly reflect what was reported to the Commission.

Mr. Caskey: I certainly think this is objectionable. The witness has not prepared it, he has not checked it. It is not in accordance with the evidence that has already been received. We object to it.

Judge Hand: Objection sustained.

Mr. Wright: I will ask to have this Paramount statement marked with the next exhibit number.

Judge Hand: This is another exhibit, Mr. Wright?

Mr. Wright: Yes.

(Marked Government's Exhibit 405 for identification.)

By Mr. Wright:

Q. Now, can you tell us, Mr. Maloney, what that Exhibit 405 for identification is? A. Exhibit 405 is entitled "Paramount Pictures, Inc. and Subsidiaries Consolidated, Analysis of Income Per Consolidated Statements of Profit and Loss." It covers the period from 1935 to 1944 and reflects amounts of income and net profit which were obtained from copies of reports filed with the SEC, which copies are in the library of the New York Stock Exchange.

Mr. Wright: We will offer this 405 for identification in evidence.

Q. One question: These net profits here are also after taxes, is that right? A. That is correct.

Mr. Seymour: Let me just ask a couple of questions:

By Mr. Seymour:

Q. What is the last column on this sheet? A. You mean the heading of it?

James J. Maloney—By Plaintiff—Direct

Q. No. What does it show? What period does it cover?
(3023)

A. The fiscal period ended December 30, 1944.

Q. The last column? A. That is correct.

Q. What column contains the figures for the year 1940?

A. For the year when?

Q. 1940. A. The column bearing the heading January 4, 1941.

Mr. Wright: May it be understood, if the Court please, generally as to each of these exhibits, if there is any figure in error on any of these, whether they have been received in evidence or not, it is of course subject to correction in accordance with the figures on file.

Mr. Seymour: I am sorry to say that I am not in a position to examine the witness in detail about this, but as long as it is taken subject to correction and subject to objection on the grounds of materiality and relevancy, if we have any corrections we shall supply them to Government counsel.

Judge Hand: All right. Admitted.

Mr. Seymour: Let me just ask one other question:

Q. The first column which covers the 1934 period is the period when Paramount was in bankruptcy, isn't that so?

A. I believe that is the case.

(Government's Exhibit 405 for identification received in evidence.)

(3024)

By Mr. Wright:

Q. Now, as to Paramount, did you also make an examination as to the extent of the excess profits tax payments? A. Yes, we did.

James J. Maloney—By Plaintiff—Direct

Q. And what did you find there? A. According to the copies of the statements available at the New York Stock Exchange, the amounts of charges for excess profits taxes appearing in the statements for the following fiscal periods were as follows:

For the fiscal year ended January 3, 1942, \$39,784;

For the fiscal period ended January 2, 1943, \$4,340,796.63;

For the fiscal year ended January 1, 1944, \$19,963,292.21;

And for the fiscal period ended December 30, 1944, \$20,355,359.90.

Mr. Caskey: Will you state for the record the rates of taxation that were applicable during those years?

The Witness: That is not possible, sir. I don't know them.

Mr. Wright: Will you mark this with the next exhibit number.

(Marked Government's Exhibit 406 for identification.)

Q. Will you tell the Court what this Exhibit 406 for (3025)

identification is? A. Exhibit is entitled "Radio-Keith-Orpheum Corporation and Subsidiary Companies." It reflects amounts of income and net profit or loss obtained from copies of statements filed with the SEC, which copies are on file with the New York Stock Exchange.

Q. And the net profits that are written in ink at the bottom there are—the first figure in parenthesis is a loss, is that right? A. That is correct.

Q. And the rest are net profits after taxes? A. That is correct.

James J. Maloney—By Plaintiff—Direct

Mr. Wright: I will say that we are not offering the part that is stricken out with the red pencil on the exhibit, and dividend payments. All we are offering is the analysis of income and net profits. We offer them in evidence.

Mr. Leisure: If the Court please, we object on the grounds of materiality and relevancy as to this exhibit.

Judge Hand: Overruled.

Mr. Leisure: And we ask that it be received subject to check and correction.

Judge Hand: Yes.

(Government's Exhibit 406 for identification received in evidence.)

Q. Did you also make an examination with respect to (3026)

the excess profits payments of RKO? A. Yes, sir, we did.

Q. And what did you find there? A. The amounts appearing as charges for excess profits taxes in the statements available at the New York Stock Exchange indicated that for the year ended December 31, 1943, the charge was \$495,000; for the year ended December 31, 1944, the charge was \$3,483,960.

Mr. Wright: Will you mark this for identification, please.

(Marked Government's Exhibit 407 for identification.)

Q. Would you tell the Court what Exhibit 407 for identification is? A. Exhibit 407 is entitled "Loew's, Inc. Consolidated Analysis of Income as shown in Profit and Loss Statements." It covers the period from 1933 to 1944 and reflects amounts of income and net profit after taxes as

James J. Maloney—By Plaintiff—Preliminary Cross

well as before taxes as obtained from copies of statements filed with the Securities and Exchange Commission, which copies are on file at the New York Exchange.

Mr. Wright: We offer that.

Mr. Davis: I object to that, if the Court please. I should like to ask the witness a question or two on preliminary cross-examination.

Judge Hand: Yes.

(3027)

Preliminary Cross Examination by Mr. Davis:

Q. Again, Mr. Witness, you did not prepare this yourself? A. No, I did not, sir.

Q. You did not examine the figures on which it is based?

A. I did not in detail.

Q. You did not make the computations that it contains?

A. I might point out, sir, no computations are involved in the schedule.

Q. There are no additions or subtractions in it? A. Well, except to the extent that it is necessary to add them to get this total. To that extent I did not make them.

Q. That is not a computation according to your conception? A. That is a computation.

Q. That you did not do? A. I did not.

Q. You did not verify this by any of the documents on which it was based? A. The original documents?

Q. The original documents. A. I did not.

Q. What is the name of the person who did do that work? A. If I may refresh my recollection?

Q. Certainly. A. The work of which you speak was performed by Special Agent Richard Trout of the Federal Bureau of Investigation.

Q. What is his occupation? A. He is a Special Agent of the Federal Bureau of Investigation.

James J. Maloney—By Plaintiff—Preliminary Cross

(3028)

Q. How long has he been so employed? A. I am not aware, sir.

Q. Was he employed for this particular job and none other? A. Oh no, he was not.

Mr. Davis: Now, if the Court please, I object to this on several grounds which I shall state: The first is it is not verified by the person who made it, and in this respect it is quite different from a computation drawn from the books of a corporation kept in its regular course of business and made either by the person in charge of the books or by some other person whom he delegates and who acts under his direction. There is no showing whatever that this witness had any part in this computation or is competent to verify that. In the second place, I object to it because it is wholly irrelevant to this case.

By way of illustration, it is a matter of common knowledge that the petroleum industry has been very prosperous, and I assume that you could make a similar statement from the books of any petroleum company in the United States within the last five years and show a steady upward curve of profit. That, says Mr. Wright, could not occur in a competitive industry, and if you showed him the petroleum industry that all the companies were prospering, ipso facto,

(3029)

according to Mr. Wright's conception, you would have shown that there was some sort of conspiracy or combination among them, which is clearly an obvious non sequitur. The fact that there is profit here has nothing whatever to do with the alleged combination or restraint of trade on the part of these defendants. I submit that the suggestion that there is anything pro-

James J. Maloney—By Plaintiff—Direct

bative here eludes any possible reason. I object to the introduction of this exhibit.

Judge Hand: We will sustain the objection on the first ground. We have admitted other schedules despite the second ground, although their relevancy here I should think is very doubtful on that.

Mr. Wright: If the Court please, on that first ground, as long as they are subject to correction I see no reason why they should not go in. We have admitted a great mass of tabular material from the defendants here without insisting on examining the witness who prepared it.

Judge Hand: Well, you cannot have utterly different things in here. If they are so, I should think you had better withdraw it and find out about it. This witness manifestly is not qualified. They raise the objection. It may not be a worthy objection to raise if you can confer and straighten the thing out, but it is obviously a good one now. Of course, Mr.

(3029a)

Caskey's exhibit there stands in the same position exactly and was excluded on the same ground.

Mr. Wright: Will you mark this Exhibit 408 for identification, please.

(Marked Government's Exhibit 408 for identification.)

(3039)

Mr. Raftery: I won't object to it, Mr. Wright. Go ahead and offer it.

By Mr. Wright:

Q. Will you tell the Court what Exhibit 408 for identification is? A. Exhibit 408 is entitled "Universal Pictures Company, Inc. State of Consolidated Profit and Loss." It

James J. Maloney—By Plaintiff—Direct

reflects the amounts of profit and loss for the period from 1935 to 1944, as these amounts were obtained from copies of statements filed with the Securities and Exchange Commission, which copies are available at the New York Stock Exchange.

Q. Now the first four years' figures, those are losses?

A. Those first four years are losses. The remaining years are profits.

Q. Those are profits after taxes? A. That is correct.

Mr. Wright: That is offered, and I take it there is no objection.

Mr. Seymour: May we see it?

Mr. Wright: Yes. (handing).

(Government's Exhibit 408 for identification received in evidence.)

Q. Did you also make an examination of the Universal data on file with the Commission with respect to excess profit tax payments? A. Yes, we did.

Q. What did you find there? A. The amounts charged (3031)

for excess profits taxes for the year 1943 was not available at the New York Stock Exchange for the fiscal period ended November 1st, 1941. The amount charged was \$711,000.

Mr. Raftery: What year?

The Witness: November 1st, 1941.

A. (Continuing) For the fiscal period ended October 31, 1942, it amounted to \$3,181,000, and for the fiscal period ended October 28, 1944 it amounted to \$6,897,900.

Mr. Wright: Will you mark that with the next exhibit number?

(Marked Government's Exhibit 409 for identification.)

*James J. Maloney—By Plaintiff—Direct**By Mr. Wright:*

Q. Now, would you state to the Court what Exhibit 409 for identification is? A. Exhibit 409 is a schedule consisting of two pages entitled "Columbia Pictures Corporation, Schedule of Profit and Loss." The schedule reflects the net profits of the company for the period from June 30, 1934, to June 30, 1944, and was obtained from copies of statements filed with the Securities and Exchange Commission, which copies are available at the New York Stock Exchange.

Q. Those net profit figures were also after taxes? A. They were.

Mr. Wright: I will offer it in evidence.

(3032)

Mr. Frohlich: No objection to this, Mr. Wright.

(Government's Exhibit 409 for identification received in evidence.)

Q. Now, did you also make an examination with respect to the excess profits payments of Columbia? A. That has been made. However, the figures are not presently available, Mr. Wright.

Q. You do not have the figure there with you? A. No.

Judge Goddard: What is the difference between the figures on this page which is attached and the main sheet? On the attached page there seems to be a different figure.

Mr. Wright: The main sheet, I believe, is the analysis of income, and there was not room, apparently, to put the net profit figure on that sheet, and so that was put on an additional sheet which is attached to the front here.

James J. Maloney—By Plaintiff—Direct

Q. Now did you cause to be prepared some charts which reflect the net profit figures after taxes that you have testified to here? A. Yes, I did.

Q. Do you have the Warner Bros. chart there? A. Yes.

Mr. Wright: I will ask you to have this chart of Warners marked with the next exhibit number for identification.

(Marked Government's Exhibit 410 for identification.)

Mr. Wright: We have no copies of this.

(3033)

Mr. Caskey: Aren't they based on excluded exhibits?

Mr. Wright: I do not think the Warners exhibit was excluded.

Mr. Seymour: May we look at that?

Mr. Wright: Yes. All that this does is put in graphic form what has already been received in evidence in precise detail.

Judge Bright: As to all of the companies?

Mr. Wright: No, that is just as to Warner. There is a separate one for each company.

Mr. Proskauer: It is a graphic illustration that we did better in the war years.

Mr. Wright: If you have the Warner work sheet there, this is simply a statement in chart form of the net profit figures that appear at the bottom of the work sheet. I think that is 403.

Will you mark these with the next four exhibit numbers?

Judge Hand: I do not know what your claim is about it. It has gone up and it has gone down here

(3034)

by strides.

Colloquy

Mr. Wright: I think the descent there, your Honor, is a plateau which is far in excess of anything which has appeared before—

Judge Hand: It is still in the highlands. Well, all right.

Mr. Seymour: May we see the rest of the chart, Mr. Wright?

Mr. Wright: Yes, as soon as they are marked.

Mr. Seymour: Of course there is no more objection to these graphs than there was to the original figures. Your Honors have overruled the objection to the figures. Now I suppose equally relevant would be graphs and charts showing the performance of American business generally through the war years; the increased consumption of agricultural products on the part of the average citizen, and perhaps quite a fancy array of those charts could be prepared too.

Judge Hand: Of course.

Mr. Proskauer: What this case needs is some charts.

Judge Hand: You could equally put in what some independent did in the way of increase in Montana.

Mr. Seymour: The only difficulty of course with that sort of thing is that the Government and not we are able to get that sort of information. This is (3035)

public information which we provided the Government with.

Mr. Frohlich: I would like to call the Court's attention, if you please, to Columbia Exhibit No. 409, just put in evidence, and the Court will note that the profits appear from 1934 to 1944 and that from 1934 to 1937 the profits were a million, a million eight hundred, a million five hundred, a million three hundred, and then there were four bad years, and then during

James J. Maloney—By Plaintiff—Preliminary Cross

the war period they ran up again to one million and six hundred, one million eight hundred, and two million dollars. With the exception of that last item of two million, the figures prior to 1938 were larger than during the war years, so that Columbia has had a stationary history for the past ten years. There has been no increase; on the contrary there has been a decrease for a four-year period.

Judge Hand: All right, we are going to let this thing in. It is a great deal safer to let in evidence of this sort. I do not see what in the world it proves, but it may connect with something.

Mr. Leisure: With regard to this graph, in order to clarify it as far as RKO is concerned, may I ask the witness a couple of questions?

Judge Hand: Yes.

Preliminary Cross Examination by Mr. Leisure:

Q. Mr. Maloney, I take it that this graph was prepared (3036)

from the figures that appear on the tables that have been offered heretofore, is that true? A. That is correct, it was.

Q. Would you mind picking up, please, sir, your table 406 for RKO?

Judge Hand: You mean for the purpose of making another graph like this, like this Warner one, like 410?

Mr. Leisure: 411 is the one I am addressing my attention to, and he says it was based on the figures in 406, the RKO figures.

Judge Hand: I haven't seen 406?

Mr. Leisure: Could you give the Court copies of the 406 one so they can see it, please, Mr. Wright?

Mr. Wright: I think your Honors have it.

James J. Maloney—By Plaintiff—Preliminary Cross

Mr. Leisure: You have that? It is the last graph that I am addressing my attention to.

Judge Bright: We haven't copies of that.

Mr. Wright: He has the only copy, the one that is marked.

Q. Do you have before you, Mr. Maloney, 406? A. I do.

Q. I note down at the bottom you have stricken out by red pencil the next to the last line under "Net Profit or Loss," is that right? A. That is correct.

Q. And then below that you have written in, in ink, in place of \$988,191.20, you have written in \$695,416.20. That (3037)

makes a total difference of \$293,785, does it not, Mr. Maloney? A. That is the difference.

Q. Would you mind telling us where you got the figures from which you wrote in? A. The figures appearing in ink are, respectively, the amount representing either net loss or net profit for that year. It is my understanding that the figures previously appearing, and which have now been crossed out, were those representing the net profit or loss before certain adjustments had been made to that amount.

Q. Those were the figures that were given by the SEC, were they not, the ones you have stricken out? A. May I ask which figures you refer to?

Q. The one just above the ones written in in ink. A. Both figures appear in the statements filed with the SEC.

Q. But what is the basis for the difference between the two columns, if you know? A. In detail, I don't know. In general I can state that it represents adjustments to income other than operating adjustments.

Q. Do those differences appear on the face of the chart here as to why those differences were made? A. You refer to the chart as being Exhibit 406?

Q. Yes. A. The differences do not appear on the face of 406.

Colloquy

(3038) Mr. Leisure: I move to strike it out. The chart is clearly erroneous if it does not show why these changes were made. I don't know how he computes this difference of \$293,785 and it does not appear on the face of the chart. I move to strike out the chart on that basis.

Judge Bright: On none of the charts do any operating expenses appear.

Mr. Leisure: He changes the figures though, Judge Bright.

Judge Bright: I see that.

Mr. Leisure: And there is no showing here on what he bases it. We cannot check that.

Judge Hand: Well, I dislike to keep hearing and entertaining these motions, some of which I will have to, to strike things out. I do not think it is the way to do it. For reasons that we have already stated, or fears that we have already expressed, we think evidence of this sort should be admitted at this stage of the case. Now, when it comes to the details of it, and the correctness of it and the checking of it, that ought to be done between the Government and yourselves. There ought not to be questions raised by motions to strike out as a good motion disposing of this kind of thing.

Do you know anything about this?

(3039) Mr. Wright: Yes. If the Court please, the figure

that was originally on there was not the final net profit or last loss figure, and I told them to get the final figure as it appeared on the SEC reports so that we would have comparable figures in each case, and, as I understand it, the figure in ink is the final figure as reported to the SEC, and that is why we drew the

Colloquy

line through the other figure and substituted the ink figure. There is no matter of computation involved there, as far as the witness is concerned. It is simply a question of copying what was on the SEC report.

Judge Hand: What about that, Mr. Leisure?

Mr. Leisure: If there is any way we can check how he got the second figure, we will be glad to do it.

Judge Bright: Aren't those your figures that you furnished the SEC?

Mr. Wright: Yes.

Mr. Leisure: There is no showing on the chart where they came from. That is the point of my objection.

Judge Bright: He says they came from the SEC, your reports to the SEC.

Mr. Leisure: If we can check it there, it will be all right, but there is no showing on the chart where it did come from. That is the point of my objection.

Judge Bright: Well, he has testified where they came from.

(3040)

Judge Hand: Don't you know this thing yourself? Haven't you got data here or in your office or in the office of your client?

Mr. Leisure: The general counsel for the company says he does not think it is accurate, that is why I made my objection, and there is no showing on the chart as to where it came from.

Mr. Wright: If it is incorrect, it can be corrected.

Judge Hand: It will be received subject to a motion to strike, if it is found incorrect.

Mr. Wright: I would like to collect those—

Mr. Proskauer: Can't collect mine because I want to question the witness very briefly.

*James J. Maloney—By Plaintiff—Preliminary Cross**Preliminary Cross Examination by Mr. Proskauer:*

Q. Are you an accountant? A. Yes, I am.

Q. Did you devise the form in which these exhibits were put in here? A. To a certain extent, I did.

Q. In notice on the RKO Exhibit No. 406 you showed as a separate item theatre admissions for the years 1940 to 1944 inclusive and you showed on the chart that RKO theatre admissions increased thirteen million dollars, in round numbers, in those four years; you note that, don't you? A. I do, sir.

Q. Why, in drawing up the Warner exhibits, did you not (3041)

follow the same course but instead lumped film rental income, theatre admissions, sales, and incidental miscellaneous income? A. To the best of my recollection the detailed figures were not available.

Q. Have you got your work sheets there? A. Yes, I do, sir.

Q. Would you mind looking at them for Warner Bros. and tell me whether those do not show separately? A. Be glad to.

Q. Don't bother with that because we will supply them separately.

Mr. Wright: We will be glad to have the separately stated figures, if they are available. We would prefer it in that form.

Q. Look at your sheets. I also notice that on Exhibit 403 Warner Bros. exhibit, you do not show any expense whatever; you simply show income and then net profit. Have you got the expenses there? A. No, sir. (3042)

Q. They showed on the statement, didn't they? A. Oh, yes, they did, sir.

James J. Maloney—By Plaintiff—Preliminary Cross

Q. Why didn't you put the expenses on? A. We weren't interested in them for the purpose of this statement.

Q. Have you got the expenses there? A. No, we do not, sir.

Q. Don't you know that in the years in question, on our sheet, that there was a reduction of expense for interest of \$2,700,000 a year? A. No, I do not know that, sir.

Q. Don't you know that in those years Warners had plowed back into paying off their bonded indebtedness enough money to reduce that expense by \$2,700,000 a year? A. No, I do not, sir.

Q. Don't you also know that in the expense account there was a difference of a million dollars a year in depreciation charged off? A. No, I do not, sir.

Q. Have you got those in there? A. No, sir.

Q. As an accountant, do you think that was a fair way to prepare this chart? A. Yes, sir.

Q. You thought that the Court should be influenced to believe that these profits had been going up without any regard to the fact that a primary reason for that was a reduction of some \$3,700,000 a year in these expense items? (3043)

A. I can only—

Q. Did you think that was fair? A. As you stated it, sir?

Q. Yes. A. As you state it, I do not.

Q. What is there about my statement of it that you think is inaccurate or unfair? A. I might say, sir, that the scrutiny of the available records at the New York Stock Exchange did not purport to be either an audit or a detailed examination of the results of the operations of any of the companies involved.

Q. What are you talking about, the New York Stock Exchange? I thought you said you got these from the SEC.

A. I did not, sir.

James J. Maloney—By Plaintiff—Preliminary Cross

Q. Have you got the Stock Exchange data? Have you got the Stock Exchange data there? A. With me? No, sir.

Q. Don't you know in the year 1929 our stock was currently selling at some substantial sum over \$100 a share?

A. No, sir, I do not.

Mr. Wright: I submit, if the Court please, this is not a proper cross-examination. I see no point in taking him into a field where he has not even been offered as having any knowledge.

Judge Hand: Overruled.

Q: I want to ask you one final question.

Mr. Proskauer: I indicate to the Court that I am
(3044)
going to supply this additional data.

Q. (Continuing.) If you are an accountant, I would like you to take our profit for the year ending August 31, 1944, and check my calculation, that it was approximately \$142,000,000, yes, the gross income, not the profit; the gross income for the last year here. A. Don't have the figures.

Q. Have you got it there? A. I have in front of me Exhibit 403.

Q. Just tell me if my calculation is correct, that our gross business, so to speak, was approximately \$142,000,000, that is, our income from royalties, rents, film rental and miscellaneous income and these other items on here, being the total amount of income that we took in from our business, was approximately \$142,000,000.

Judge Hand: This is 1944?

Mr. Proskauer: That is right, sir. I am taking the last year.

A. The total income stated, including the total of the items under the caption "Other Income", amounts to approximately \$142,000,000.

James J. Maloney—By Plaintiff—Preliminary Cross

Q. And the profit was just under \$7,000,000, wasn't it?

A. The profit as stated—

Q. As you show it. A. (Continuing) —is \$6,953,000.

Q. I want you to check my calculation that on a gross
(3045)

of about \$142,000,000, we earned \$7,000,000 in round numbers, which was approximately 4.9 per cent. Perhaps I can help you by showing you my lead pencil calculation.

Mr. Wright: Obviously, counsel can make any calculation he pleases from the exhibit without—

Mr. Proskauer: What is it? This thing has been offered here to show some kind of swollen profits, and I am showing by this witness's mouth that we did business on a margin of less than 5 per cent.

Mr. Wright: You are not showing anything out of the witness's mouth that is not available on the face of the chart. I submit it is a waste of time.

Mr. Proskauer: I ask my right to show it out of the horse's mouth—the witness's mouth.

Q. See if I do not divide correctly, Mr. Maloney, will you? Is it Maroney or Maloney? A. Maloney.

Q. Mr. Maloney. A. Without reference to your division, it is approximately 4.9 per cent.

Q. You have confidence in my division. A. I do, sir.

Mr. Proskauer: That is all, sir.

Mr. Davis: If the Court pleases, your Honors have admitted all these other computations. I objected to the computation as to Loew's, perhaps in a spirit of some impatience, because I had sat here and seen a miscellaneous mass of irrelevant documents laid on the table and I had a hideous feeling that some day

(3046)

somebody has to plow through them, and that possibly

Colloquy

that might even be myself. I was as much moved by consideration of my own convenience as the Court's in objecting to these documents. I think my objection was sound. I am delighted that your Honors ruled with me. I maintain my objection as to their relevancy, for if these documents showed that the companies had all lost money, I suppose that would be no defense to a charge that they had combined and conspired in the hope that they might make it, and I know of no reason why the two sides of that equation are not the same, that if they have made money, it is not proof that they combined and conspired in order to achieve that result. And I want to say before I conclude that I do not understand at all what idea is in Mr. Wright's mind when he says that they haven't passed along their profits to the public in the form of reduced theatre admissions. I say boldly for Loew's, Inc. that when we make profits, we used first to pay our fixed charges and the remainder belong to our stockholders and does not belong to the public at all, and there is no reason why our stockholders should be called on to pass on to the public the profits that have been earned on their investment. We are not a public utility. Our rates are not subject to regulation. We have a perfect right to charge any price that the public is willing to pay for its amuse-

(3047)

ment, and the only restraint on it is that if we charge too much, the public will turn their backs and find some other way to spend their leisure time, but certainly that is not a matter within the confines of the Sherman Act.

Having relieved myself to this extent, I withdraw my objections heretofore made to the admission of this as to Loew's.

James J. Maloney—By Plaintiff—Direct

Mr. Wright: I believe Loew's exhibit is already marked for identification.

Judge Hand: Yes, it is.

(Government's Exhibit 407 for identification received in evidence.)

By Mr. Wright:

Q. I will ask you the same questions with respect to this Loew Exhibit that I did the others, as to what, if any, examination you made with respect to excess profits payment by Loew's? A. The amounts of charges for excess profits taxes appearing in the copies of statements filed with the SEC were obtained.

Q. Can you tell us what they were? A. The amounts appearing as charges for excess profits tax were as follows: For the fiscal period ended August 31, 1942, \$1,666,883.09; for the fiscal year ended August 31, 1943, \$14,816,915.87; and for the fiscal year ended August 31, 1944, \$4,428,273.79. (3048)

Mr. Wright: I will also have to ask to have marked for identification a graph which simply sets forth in graphic form the data that is recorded in Exhibit 407.

Mr. Davis: I want to ask the witness a question.

Judge Hand: 410 was admitted, wasn't it?

Mr. Wright: 410?

Judge Goddard: Yes.

Mr. Wright: I believe that is the Warner graph.

Judge Bright: Here it is up here.

Judge Hand: I do not think that Judge Proskauer objects to that any more than to anything else.

Mr. Proskauer: Oh, you mean that chart?

Judge Hand: Yes.

Mr. Proskauer: I am devout follower of the chartist movement.

James J. Maloney—By Plaintiff—Preliminary Cross

Mr. Wright: I will ask to have the Loew graph marked as 415 for identification.

Mr. Proskauer: All I want to do is put in the data on here on a couple of sheets, showing our financial history since the year 1929.

Judge Hand: I suppose it shows a kind of Swing Low Sweet Chariot curve.

Mr. Proskauer: There is more than that. It shows what I intimated in my cross-examination, 1929 was our big year, and it also shows that the witness,

(3049)

with characteristic fairness in this case, deliberately omitted and that was what is shown in all these other things, the abnormal theatre attendance during the war period.

Mr. Wright: I will now—

Mr. Davis: Before you drop this line, I want to ask a question.

Preliminary Cross-Examination by Mr. Davis:

Q. In the chart 407, giving the profits of Loew's for the years from 1933 to 1944, do the receipts there include receipts from foreign as well as domestic business? A. If I may refresh my recollection a moment?

Q. Surely. A. I am very sorry I have to tell you that these documents do not indicate in sufficient detail to warrant my statement whether or not all foreign subsidiaries have been included.

Q. You do not know then whether they have been included, or if included, how much foreign business amounted to? A. That is correct, sir.

Q. On the next to the last line on this table you will find the line "Less provision for taxes." How does that line compare in amount with your statement of the excess profits taxes? A. Up until the fiscal year ended August 31, 1941, and

James J. Maloney—By Plaintiff—Preliminary Cross

including that year, no statement was made by me as to the amount of taxes. With respect to the three years ended (3050)

August 31, 1942, '43 and '44, the amounts of taxes as stated in Exhibit 407 differ from the amounts as previously stated by me for excess profits taxes, and in each case the amounts appearing in Exhibit 407 are in excess of the amounts previously stated by me.

Q. Do you know what additional taxes are included in that excess? A. If I may observe for one moment, please. The entire amount of the excess is also federal taxes, presumably federal income tax. The prior statement made by me did not refer to income taxes.

Q. For the year 1942 what did you report for excess profits taxes? A. I stated that in the annual report filed for that year a charge appeared in the amount of \$1,666,883.09.

Q. As against a total tax item of \$9,704,001.40? A. That is correct.

Q. What did you report for excess profits taxes in 1943? A. I stated that the amount appearing as a charge for such taxes in the annual report filed was \$14,816,915.87.

Q. Against a total tax of \$23,731,916.66? A. That is correct, sir.

Q. For 1944 what excess profits taxes are on your statement? A. The amount appearing as a charge for those taxes for that fiscal year was \$4,428,273.79.

Q. Against a total tax item of \$15,161,968.69? A. That is correct, sir.

(3051)

Q. It is true, is it not, that on your table and on your chart, with the exception of the closing months of the year 1944, the year of highest earnings as the year 1937? A. It appears from the information available that the year in which Loew's, Inc. and its subsidiaries made the greatest net profit was the fiscal year ended August 31, 1944. No other information appears.

James J. Maloney—By Plaintiff—Preliminary Cross

Q. Does it not appear from your chart that the year of highest earnings, except for the closing months of 1944, was the year 1937? A. I can only answer that question—

Q. Have you that chart before you? A. I know what is on the chart. I can only answer the question by stating that that particular type of chart, while I do not purport to be an expert chartist, that type of chart only reflects the points on it. The lines drawn between the points are not of significance.

Q. I can't labor the obvious, but it is very clear, isn't it, that there is a mountain peak on this chart in 1937 and a valley, the depth of which was reached in 1940? A. May take me a little longer because I only have the figure to look at.

Q. You may look at the picture. A. If I may.

Q. Although I think the picture speaks for itself in that regard, if it speaks at all. A. It appears that the lowest (3052)

point of earnings was the year ended August 31, 1933.

Q. Isn't it a fact on your—lease the chart aside—on your table—I am only asking this question to put on the record what is perfectly obvious on the table itself—in the year 1937 the net profits were \$14,333,716.70 and in the year 1944, \$14,817,285.79? A. If I may correct your figures. The last one should be \$14,517,285.79, that is correct.

Q. I am wrong, '517. So that there is a difference there of something less than \$200,000 in those two years? A. That is correct.

Q. And those are the big years on the table? A. Those are the two highest points on the chart and the two biggest years in the table.

Mr. Wright: I will offer in evidence these graphs marked 410 to 414 inclusive, 410 being the one for Warner Bros., 411 RKO, 412 Paramount, 413 Columbia, 414 Universal, and 415 Loew's.

James J. Maloney—By Plaintiff—Direct

(Government's Exhibits 410 to 415 for identification received in evidence.)

Mr. Wright: Mr. Leisure has agreed that these exhibits, previously identified as 388 and 389, may be received in evidence.

Judge Hand: Is that the one—

(3053) Mr. Wright: This is an exchange of letters that

was identified while Mr. Mochrie was on the stand. I won't bother to read them at this time.

Judge Hand: Have you mollified Mr. Caskey yet? If that were possible, you could say the house proceeds.

Mr. Proskauer: I have been trying it for years. I have been trying that in vain for years.

Mr. Caskey: If Mr. Maloney will come down to the office tomorrow, I will have the auditor of the company there and they can make up the chart, and if they agree on it, it may go in. I assure your Honor this is not a question of technicality. This is just plain wrong. The film rentals of Twentieth Century-Fox did not increase 90 million dollars in one year.

By Mr. Wright:

Q. Can you do that, Mr. Maloney? You can get over there tomorrow.

Judge Hand: It looks extravagant.

Mr. Caskey: If it did, they didn't tell their attorneys.

Judge Hand: We call that a sinister suggestion.

Mr. Wright: That is all, I think, Mr. Maloney.

Mr. Rafferty: May I give you some more papers, Mr. Wright?

Colloquy

This is the letter that came this morning. He wanted the second-run contract for Stage Door Can-

(3053a)

teen in Atlanta, the Riviera Theatre in Los Angeles, Bard's Adams Theatre in Los Angeles, The Stage Door Canteen Sunset contracts in Cincinnati, and the contracts of the Fox West Coast Agency Corporation for sub-runs in Los Angeles. I have only a memo contract, which is a spot booking contract, and that's that.

Now, on Universal I have the rest of that stuff.

(3054)

Mr. Wright: If the Court please, with reference to working out an orderly procedure, I would like to say this: Of course, we can stand here and mark for identification material that is handed to us and just offer it, but I do not think that that makes the kind of a record that anybody wants in the case, and I should like to renew my request for a recess in the hope that we can gather together this contractual material and perhaps in some cases avoid encumbering the record with the actual contracts themselves at all; perhaps submit simply a schedule of rental terms or the clearance provisions or whatever it is we wish to establish in the particular case.

Judge Hand: What do you want, until Monday?

Mr. Wright: We would be able to go ahead Monday. I am hopeful that given a recess of that kind we could finish the whole presentation in a matter of about two court days. That is, of course, with the proviso that we actually have an opportunity to get at the material and organize it so it can be put in with the minimum delay.

Mr. Proskauer: Do not organize it the way you did these things here today.

Colloquy

Judge Hand: Now, where is this material? Does it have to be flown here from the West Coast? Or is it here?

(3055)

Mr. Wright: As I understand it, there are copies of all of these contracts at the home offices of the exchanges in New York.

Mr. Caskey: Let me understand these things, Mr. Wright. We certainly have not told you any such thing, and it is not correct. You asked for the 1941-42 contracts, which are not at the home office.

Judge Hand: When did you give notice to your principals there to get them?

Mr. Caskey: On the list that came out on November 3rd, they are here available. On the ones that came this morning, we called up; one of my associates called up during court, and this is dated November 12. They want license agreements for 1941-42. Those license agreements are in Ogdensburg.

Judge Hand: Ogdensburg, New York?

Mr. Caskey: Yes.

Now, I want to say to Mr. Wright one thing: There are two classes of data, really, that were asked for. One, as far as Fox is concerned, where the answers to certain of the interrogatories is deemed by the Government to be imperfect, we told Mr. Marcus on the 5th day of October that we could not supply the additional data, and no matter how many more letters they write the answer is still the same; so I

(3056)

do not want Mr. Wright to come into court next Monday or any other time and say we haven't got them, because that would be perfectly true, we haven't got them. We simply have not got the data. That may not be true as to some minutiae, but generally

Colloquy

speaking we have not got them. As to the contracts, we will start giving it to them as soon as the court adjourns and do the best we can.

Judge Hand: Now, as to the material in Ogdensburg; it either could be flown down from Burlington, or sent down by mail.

Mr. Caskey: Actually we have to send someone down to get it because there is no file clerk there.

Judge Hand: And then you have this West Coast stuff that is all here except what was asked for on the 12th; is that so; or is it all here anyway?

Mr. Caskey: Well, as I understand it, all contracts for the 1942-43 season and subsequently are here.

Judge Hand: So you have got everything but the material from Ogdensburg?

Mr. Caskey: That is right; and the material which is the alleged deficiency in the answers to the interrogatory.

Judge Hand: Could Mr. Wright go on without
(3057) Ogdensburg? How about it? Does it amount to anything? Can't you agree on it?

Mr. Wright: I do not know what he is referring to offhand. I think it would not be of significance in itself.

Mr. Caskey: It is the license agreement for the 1941-42 seasons covering the exhibition of Fox pictures in the Middleboro Theatre, Middleboro, Massachusetts. Theatre, Brockton, and part theatre, Taunton; and the first-run exhibition in Boston for that season. That is what we haven't got. That is what is in Ogdensburg.

Judge Hand: Those things are in Ogdensburg?

Mr. Caskey: Yes, at the warehouse.

Colloquy

Judge Hand: That is a queer place to put them.

Mr. Caskey: That is where Fox maintains its plant where they reclaim the silver nitrate from the films, and we have a warehouse there. We had someone testify that there were over a hundred thousand of these contracts.

Mr. Seymour: I should like to report, if your Honors please, on the status of my pending request. We handed Mr. Wright this morning at the conclusion of the morning session photostats of 148 contracts (3058)

that he called for. We will photostat and give him in the next few days the balance of all the contracts that he has called for, and we will then have complied with all his requests except one, and if we do not get any more requests he will be all right.

Now, the one that we cannot comply with is one for Paramount equivalent to the one Mr. Caskey has just mentioned. On Monday of this week one of Mr. Wright's associates asked two of my associates to get in touch with theatres all over the United States and find out admission prices charged several years ago and clearances in effect several years ago which are not in the contract; and we told him that it would take weeks to get that information; and they suggested that we might give it to them after the case was completed and then they could use it in their brief. Now, I am utterly unwilling to have the case proceed after the end of it in that way.

Judge Hand: You are entirely right. We are not going to have it, you can be sure of that.

Mr. Seymour: And so I am unable to supply that information. I want to give Government counsel notice now that we cannot procure and furnish that information within any reasonable time, and therefore

Colloquy

(305) we decline to do it. We have given him all the information presently available through the interrogatories and much additional information. That we cannot obtain and supply.

Mr. Wright: We are glad to find that out. I might say, your Honor, that this data that he is referring to now is interrogatory answer material which was reported to the Court as being ready to be handed over to us last July. It never was. If it is never going to be, that is all right. But he is not talking about any new request. That was material that was then to be given us and which we never got.

Now, I would agree with the Court there is no point in deferring any further or holding the case open to pick up any additional interrogatory data that was supposed to come to us before and never got to us. We will just have to work with what has now been given us. But as I pointed out, they have been in many instances giving us revised or different figures, which has involved our recomputing in each case tabulations that we have already made, and there is a substantial burden of tabulation imposed there by reason of changes that occurred since we recessed.

Now, we have not yet seen, if the Court please, even the defendants' complete case. As I understand from Mr. Seymour, he still has some more, additional, affidavits which he wants to get in, and, of course, we

(3060)

should have those too before we close our rebuttal.

Judge Hand: How about those?

Mr. Seymour: As I told your Honors, the affidavits which we propose to supply are with one exception in the same category as affidavits already in. There is one exception to that which I mentioned specifically. The minute those affidavits are in New York so that we

Colloquy

have them we will furnish copies of them to Mr. Wright and we expect to have them by the end of this week. The only other problem, as far as we are concerned, is this problem of corrections. It has been impossible to assemble proposed corrections and discuss those with Government counsel. That would need to be done.

Mr. Wright: I would assume, your Honors, that an adjournment to Tuesday would be safer than a Monday adjournment, and I am sure that we could use the time in shortening and getting together in that period the actual presentation.

Judge Hand: As I understand it, you have got three affidavits to be furnished by Mr. Seymour. Then you have got a checking up of this Fox business by Mr. Caskey. You have no more evidence, have you?

Mr. Caskey: No, sir.

Judge Hand: You have got the Ogdensburg ware
(3061)

house data. How many exhibits in that? Three or four?

Mr. Wright: I think there are only a couple of contracts involved there.

Judge Hand: A couple of contracts at Ogdensburg? Now, what else is there?

Mr. Wright: We have also asked for specific letters in addition to specific license agreements.

Mr. Proskauer: I can't hear you.

Judge Hand: He said, "We have also asked for some specific letters in addition to the license agreements."

Mr. Caskey: I may say as to one letter we have no copy of it and no knowledge that it exists, and our information is that it does not exist, and I have no personal knowledge of the situation; but we will have no copy to furnish Mr. Wright; so if you are going to

Colloquy

offer secondary evidence you had better be prepared to go ahead on that basis.

Judge Hand: Well, what more is there? Secondary evidence that you have about this letter?

Mr. Wright: It may be necessary, of course, in the event that a letter we have requested is not produced where we only have—

Judge Hand: He says it won't be. He tells you it won't be.

(3062)

Mr. Wright: Yes. Well, in that case we shall attempt to get in touch with the party who can make an affidavit as to the copy and submit that to Mr. Caskey in an attempt to secure a stipulation which would make it competent if we need to use it. It seems to me it is the kind of thing there is no need to call a witness for.

Mr. Caskey: I certainly do not want to be put in a position where I am charged with delaying the case because I do not agree to some affidavit. If you have got competent evidence, put it in. I know nothing about it. It is a letter dated January 2, 1935, relating to Sterling, Colorado, which I understand has a population of 648.

Mr. Seymour: One of my colleagues asked me not to cut myself off from the possibility of sur-rebuttal if the Government should put anything by way of rebuttal in that we thought warranted it. We have not seen that yet and we do not expect to see it.

Mr. Proskauer: Your Honor, I do not think this warrants it, but I want to put in a couple of short schedules with the proof of what my cross-examination questions suggested.

Judge Hand: If we adjourn until Tuesday do you think you can finish the case on Tuesday and Wednesday?

Colloquy

(3063)

Mr. Wright: For our part we would make every effort to do just that.

Mr. Raftery: If your Honor please, that was the question I was going to ask, for a very selfish reason: I have got to go to England a week from Saturday, and I was going to suggest Monday instead of Tuesday, thinking of possible sur-rebuttal which might come from some of my learned colleagues. But I would hate to see it go over to Tuesday, because I have been for months trying to get passage, and I just had passage confirmed. It is very difficult to get over there, and I have got to go a week from Saturday. Now, I prefer Monday if we could go on Monday, and we would at least have three days instead of two before Thanksgiving.

Mr. Wright: We would like, of course, to accommodate Mr. Raftery in any way we could, and I am sure that if there were any occasion to put anything in that he wanted before we left we could work it out so that he would not be detained. But I do think that we would be put under a severe strain in getting this material ready by Monday, and I do not think there would be any net saving in time if we had to go ahead Monday instead of Tuesday.

Judge Hand: Well, my associates who are very

(3064)

Thanksgiving and family-minded and live in the provinces and go there are anxious to have the thing go on Monday lest it be hung over. They want to finish this thing by Thanksgiving; and your trip abroad points that way. I do not believe anybody will be much distressed, in the condition this case is in now, by the addition of these contracts in Ogdensburg, and so on.

Colloquy

In how large towns were these exhibits?

Mr. Wright: As I recall it, all that is involved in that Ogdensburg situation is an attempt to straighten out the testimony on cross-examination here. There was a difference or dispute as to whether or not the clearance given by the other distributors had been maintained by Paramount. The only way we could see to do it is to get the contracts of all distributors so you could compare them in that situation, and that is the way this Ogdensburg thing arose before and after.

Mr. Caskey: You mean we are asked to produce these contracts so that you can—

Mr. Raftery: Mr. Wright—excuse me, Mr. Caskey—here is the situation on Middleboro for Universal, and the other town of Ayers. I have held them back since 3:10 p.m., and I have not anything for the current season because he did not buy the product in Middleboro; and the theatre in Taunton you have

(3065)

asked for you have already got in the M. & P. franchise. So now you have got that to compare with the testimony.

Judge Hand: So Ogdensburg is cleared?

Mr. Raftery: Well, that is Universal. You can study those.

Mr. Wright: Certainly, your Honor, the absence of the Ogdensburg material would not prevent us from going ahead on Monday or closing the case on Wednesday. But we would like to have it if we can get it.

Judge Hand: Well, I think it is better to put this over until Monday. You are all of you going to be anxious to get away for Thanksgiving, and I think it is a wiser disposition of it, really. It makes no dif-

Collòquy

ference to me, of course, which you do, but I think we shall adjourn until Monday at 10:30.

Mr. Proskauer: Your Honor, could we use a few minutes here to discuss what we are going to do after the case is closed here? I should assume the Court would like an oral argument at some stage of the case.

Judge Hand: There is no doubt about that.

Mr. Proskauer: And my suggestion is—and I suggest this to the Court as a way which I think would be most helpful to the Court—if we could get Mr. Wright's brief and give our answer, and then have an oral argument, I think it would enormously reduce

(3066)

the area of conflict. We would know exactly what we are to meet, and if we could make some tentative arrangement at least as to how we are going to handle that, it would be a great comfort to those of us who have other court engagements that are waiting until we can give some word here.

Judge Hand: Well, when could you have your brief ready, do you think, Mr. Wright?

Mr. Wright: Well, if the Court please, I think to save time we would prefer an exchange of briefs. We have already filed a fairly extensive trial brief, and it seems to me that we could both exchange briefs, I should say, within 30 days after the close of the case, and then set the matter down for argument.

Judge Hand: I should think you had better serve a brief on them within two weeks after you have closed the case, and give them then ten days to answer that brief.

Mr. Seymour: It is awfully short, if your Honor please.

Mr. Raftery: Unfortunately I won't be back here until the 16th of December. I made sure I had passage back before I went over, and I certainly would not have any time to write a brief.

Colloquy

Mr. Proskauer: Your Honor, let me suggest how this case envisions itself to counsel. I anticipate we
(3067)

are going to get a brief from Mr. Wright charging us with high crime and misdemeanor in Ogdensburg, in that town with a population of 680, and a great many local situations.

Mr. Wright: That is quite wrong if that is what you are anticipating.

Mr. Proskauer: I am delighted to hear you say that. I do not know what else you have, but if you have anything else we are glad to get it. But the moment we know what there is there we have got to organize this material with reference to the specific charge. I should think we need two weeks——

Mr. Seymour: If your Honor please, if the Court feels they can indulge us, Mr. Wright may know what is in this great mass of documents, and he will probably point out what he likes about those or what strikes him as of some significance——

Judge Hand: I should think two weeks for him and two weeks for you——

Mr. Seymour: If you could give us any more time, your Honor, in view of the fact that we are going into that Christmas period——

Judge Hand: Well, I know that. Of course, I realize that you have all done very well in this case, but what are we going to do if we just have this case
(3068)

stringing along with three judges tied up here? We cannot take up other things while this is pending.

Mr. Proskauer: Your Honor, would you consider it fair to give Mr. Wright three weeks and give us three weeks and then let us appear whenever you say and argue? You do not have to bother about it

Colloquy

while we are briefing. I think we would all be much happier, and I am venturing to plead for my friend Mr. Wright over there.

Mr. Wright: I might say, your Honor, we have an argument set for December 6th in Buffalo in an attempt to dispose of objections which have been raised to findings and motions to modify the judgment in the Schine case, which I shall probably have to argue myself. I would find three weeks quite short, but I would prefer the exchange to save the time that way.

Mr. Proskauer: An exchange is wholly unacceptable to us. I do not want to write a brief and then find that I have not surmised the mysteries of Mr. Wright's mind.

Judge Hand: I rather think you need that time. What are you going to do about your briefs? Have separate briefs for everyone?

Mr. Proskauer: We are going to have separate briefs, your Honors, but I assure you we will confer and try to avoid duplication as far as possible.

(3069)

Judge Hand: I hate very much to do it because it is not at all agreeable to the Circuit Court of Appeals, this whole layout. They do not like it a bit, and they do not like the emergency certificate or anything about it. They are about as soft about it as anything you can imagine. It just takes men right out, takes three men out of the court, and leaves the situation with a huge amount of investigation and doubtless a long opinion to write weeks from now.

Mr. Proskauer: I can suggest a very short opinion, your Honor.

Judge Hand: We cannot tell you about this right now. We are not going to.

Colloquy

Mr. Proskauer: I have studied this situation pretty carefully in the last few days, and I am sure that ultimately we will save your time if we can get the Government's brief, giving them a reasonable time—I suggest three weeks—and giving us that time to meet it, and then coming before your Honors and arguing it out on those briefs. And if anybody wants to file a memorandum in reply, we can do it on the argument day, say, or just after the argument day. Sometimes things develop in the argument that one would like to file a brief memorandum on.

Judge Hand: I can be very sure of one thing,
(3070)

and that is that no matter what happens, except casualties like death, we are not going to postpone the final submission after the first of the year. I mean, the argument may be made the 2nd or 3rd of January, or something like that, but we are not going to just string this thing along. You know, it is really too expensive a way to do this, whether it is decided right or wrong. There has got to be some kind of arrangement so that the courts can do their business.

Mr. Proskauer: If Mr. Wright would file his brief by the 1st of December—well, we would like a Christmas holiday, but I suppose no lawyer is entitled to any holiday.

Judge Hand: I think in this case you had better try and finish before Thanksgiving, and then divide the time between that and—what is the 1st day of January?

Mr. Caskey: Tuesday, sir.

Judge Hand: Divide the time between the 2nd or 3rd of January in some way about the submission of briefs. That gives you about what you both think you need.

Colloquy

Mr. Proskauer: Which means we are going to be working during the Christmas holidays, and unfortunately that falls on the defense, which is a penalty we have to pay for their filing the certificate.

(3070a)

Well, your Honor will give us the final answer then when we meet next week?

Judge Hand: Yes. I think that suggestion, though, is about the best you can possibly do.

We will adjourn now to Monday at 10:30.

(Adjourned to November 19, 1945, at 10.30 a.m.)

Colloquy

(3071)

New York, November 19, 1945;
at 10:30 o'clock a. m.

Trial resumed.

Mr. Wright: If the Court please, I want to say first that those boxes of exhibits you see there around the witness chair are exhibits already in evidence. That does not represent the material we propose to offer; and I want to make a progress report on what was done during the recess to simplify the presentation.

We had two sessions with counsel, one on Friday afternoon with those who do not work Saturdays, and the other on Saturday afternoon with the others, at which we marked in the order in which we would present them and supplied copies of the material we propose to offer here which summarizes this material that is in evidence, and made available the witness who made the tabulations for such questioning as to how any of the charts were prepared.

We also have attempted to follow the Court's suggestion and have one master list of theatres in which all defendants have interests which all defendants agree to. Some have agreed to the figures in our ap-

(3072)

pendix as such; others with modifications, and others are still in the process of checking. I hope to have that disposed of at the end of the day.

Now, as to the contract material that we asked to inspect, such as that which was made available for inspection, we have prepared certain schedules on, and propose to submit those schedules with the supporting data today, and then offer tomorrow either

Colloquy

the schedules without the data—Mr. Shears, who was in charge of that, I believe can tell the Court exactly what the status of that is.

Mr. Shears: We ask that those schedules purporting to show rental discriminations be marked for identification.

Mr. Davis: May I interrupt, Mr. Wright. I want to get a modest offering off my back that has been around here for a week.

Mr. Wright: Oh, sure.

Mr. Davis: We introduced in evidence a schedule showing the amounts which we had paid for feature pictures exhibited in our theatres. That was in dollars. I now want to offer in evidence a schedule showing the films which were exhibited in our theatres and the source from which they came. I have photostats here, Mr. Wright, just received.

(3073)

(Marked Defendant Loew's Exhibit L-16.)

Mr. Davis: I also want to offer in evidence supporting that schedule a folder containing statements of all the films purchased or licensed to us from 1934 to 1945 inclusive in the 73 critical cities. I offer that in evidence. Photostats of this will be furnished as soon as we get them.

(Marked Defendant Loew's Exhibit L-17.)

Mr. Wright: I have not seen these, if the Court please. I assume they are taken subject to such correction as might be necessary on checking.

Judge Hand: Yes.

(3074)

Mr. Raftery: Your Honor, may I correct the record? You remember the two Stage Door Canteen contracts that Mr. Wright put in last week, and he

Colloquy

said that we sold the first-run in San Angelo, Texas, for \$50. Well, on checking our records I find that the first-run was sold for 35 per cent of the gross and paid a film rental of \$465. So I have listed each of the runs in the town including the run in question. The run in question was the fifth run and he paid \$20 against 35 per cent of the gross. He paid us \$3.05 overage, so we got \$23.05. I would like to give Mr. Wright a copy of the schedule and I would like the Court, that is, I mean the clerk, to attach that to Mr. Wright's exhibit. And I also have the supporting memo contract for his inspection, showing we got 35 per cent of the gross first-run in that town.

Mr. Wright: There is a conflict between this schedule and the exhibit. The exhibit shows four runs at flat rentals ahead of the Roxy. Which is supposed to be correct?

Mr. Raftery: There are three ahead of the Roxy and one after the Roxy—\$12.50 played after. Those are the play dates; that is the performance.

Mr. Wright: Thank you.

Mr. Raftery: Here is the other contract, 35 per cent of the gross first-run.

(3075)

Mr. Wright: We have no objection.

Judge Hand: Mr. Wright, can't you have this thing in once and have it right?

Mr. Wright: If the Court please—

Judge Hand: Or do you still dispute inferences to be drawn and things of that sort?

Mr. Wright: We would have been glad to submit this schedule in the first instance. We were only given those contracts that I put in there.

Judge Hand: I am not talking about your unfortunate position, due to ignorance or withholding some-

Colloquy

thing. I am talking about what the situation is here before us. I don't care anything about how it arose.

Mr. Wright: Well, I say, as far as we are concerned, on Mr. Raftery's statement, I take this schedule as a correct representation of what the situation is. I did not object to it. I assume it is correct.

Mr. Raftery: Mr. Clerk, it is 401 or 402, I don't know which. It is either one of those two contracts.

Mr. Wright: Is there any more defendants' material that was to be offered?

Mr. Seymour: Do I understand, Mr. Wright, that this gentleman is marking for identification some things you are going to furnish to us?

Mr. Wright: I don't think they need to be marked

(3076)

for identification but we have assembled in these folders with a schedule the documents which support the schedule, and those, I assume, can be checked. We could offer the schedule without offering—

Mr. Seymour: When are you going to make them available?

Mr. Wright: Right now. They should be checked. I think here or upstairs.

Mr. Raftery: Mr. Wright, have you any of the stuff that he took from us on Friday? Have you anything for us?

Mr. Shears: I would like to have those marked for identification.

Judge Hand: Can it be ascertained with reasonable certainty whether you defendants have rested, or have rested subject to proceedings had and to be had and all kinds of reservations?

Mr. Proskauer: I have—

The Court (Judge Hand): Where is your case?

Mr. Seymour: I will tell you where mine is.

Colloquy

Judge Hand: We put it in, here a little, there a little, line by line, precept upon precept.

Mr. Seymour: I will tell you what my situation is for Paramount. I reserved the right to offer certain affidavits. There are still two to come. We hope they will be here by tomorrow. I thought I would put it

(3077)

in all at once. Subject to correction of the record, which I have already referred to, we have no evidence on our direct case.

Mr. Wright: If the Court please, we would like to see them today because in preparing our motion to strike, which we still haven't been able to complete because of this delay in presenting defendants' evidence—

Mr. Seymour: I have furnished the affidavits the moment they arrived in New York. I furnished several affidavits at the end of last week, when we were out of court, and we will furnish the others when they get here.

Mr. Wright: You are not referring then to any affidavits, copies of which haven't been given to us, is that correct?

Mr. Seymour: That is right.

Mr. Davis: For Loew's Incorporated, if your Honors please, we are through in chief. We reserve the right to offer material in sur-rebuttal, if it becomes necessary.

Judge Hand: Of course. You are through except for that.

Mr. Proskauer: I am through excepting I want to make good my threats to Mr. Maloney on my cross-examination of him, just strictly sur-rebuttal, and I may have another chart in what I think is strictly sur-rebuttal.

Colloquy

(3078)

Mr. Caskey: We rest.

Mr. Leisure: Mr. Davis's position covers our position.

Mr. Raftery: We rest subject to the fact that we got two more letters on Friday for about a hundred more papers. I have given him the papers and unless they come up with some tricks, like first-run San Angelo, we rest.

Mr. Proskauer: That reminds me, though, your Honor, that we also got gentle requests for a large number of papers on Saturday. There is quite a sick list developing from our assiduity in preparing the Government's case at the last minute, and I do not know what is going to develop from these new documents he has asked for. I reserve whatever may be necessary with respect to those.

(3079)

Judge Hand: Does the Government know? Of course, you can brood on the infinity of it forever, and it is pretty near infinity, this thing, and keep the thing at loose ends.

Mr. Wright: If the Court pleases, we are trying to cut down just as far as we can any further documentary material by this schedule procedure, and in so far as anything that hasn't yet been produced, of course, we cannot do anything about that. We are not going to attempt to do anything with any documents, in connection with which we requested inspection, beyond what has been done by Mr. Shears which I submitted to them this morning. So that is out of the way, as far as we are concerned.

Mr. Caskey: Mr. Wright, you hand me this letter—

Mr. Shears: Just a moment. I would like to make a statement on that paper, and it will clear it all up,

Colloquy

I am sure. These schedules which have been submitted to defendants, if your Honors please, are to be marked for identification only this morning. They represent tabulation of data taken from license agreements selected for the most part from Appeal Board decisions from towns in five states: New York, Louisiana, Texas; Washington, D. C.; and Kansas, Missouri. They were supplied in response to our requests of November 3rd and November 14th. They reflect the degree of cooperation of each defendant, some 100 per

(3080)

cent, some zero. From two defendants we have received no comparable material, or material so incomplete that no comparison could be made. The folders attached to each schedule contain the supporting license agreements that were made available to us.

Judge Hand: Is that statement of yours a mere statement of fact or a complaint, or what is it?

Mr. Shears: It is a mere statement of fact to explain the schedule.

Mr. Proskauer: I don't hear you.

Judge Hand: A mere statement of fact.

Mr. Shears: The folders attached to each schedule contain the supporting license agreements that were made available to us, and we would be glad to have each defendant check over his own material, either here or up in Room 1901. I shall offer these schedules without the supporting documents tomorrow at 10:30, to avoid encumbering the record.

It is submitted that the material received today is too late for these tabulations.

The balance of the license agreements supplied, we are returning. We have no attention to defendants adding any comparable material they may feel that we have overlooked.

Colloquy

Mr. Seymour: You are not going to compliment us by name for our cooperation?

(3081)

Mr. Shears: I would be glad to mention that RKO has given us 100 per cent cooperation and Columbia zero.

Mr. Caskey: I do not know what our percentage is, but I understand that—

Judge Hand: I take it we are to understand that is merely a statement of fact and not a complaint.

Mr. Shears: That is correct.

Mr. Caskey: Of course, as far as we are concerned, at 7 o'clock on Friday we had furnished the Government with 565 contracts. We had not furnished them with the contracts relating to New Orleans. They were told on Saturday that they could not be available until this morning. They were tendered this morning, about 10:10, and they were rejected. I offer them again, if they are wanted, but I assume that they are not.

Mr. Shears: I should like to state in answer to that that our letter of November 3rd requested the New Orleans material. I submit that is sufficient time to have submitted it for tabulation prior to this morning.

Mr. Frohlich: Let me say this about Columbia's alleged lack of cooperation. That is not the fact. We received a list from Mr. Wright a few days ago for about 50 contracts in these various cities. I came down and spent Saturday afternoon with Mr. Wright, all afternoon with him, and told him that of the fifty,

(3082)

Columbia only sold in 12 situations and it had only three contracts available and would be happy to give them to him, and he said, "You don't have to bother with it. I won't be able to use it."

Colloquy

Judge Hand: Why don't you tell me these things at the time of your argument?

Mr. Caskey: They were delivered, some on Thursday and some on Friday. We tendered them 565 contracts.

Mr. Proskauer: Your Honor, with all this talk of cooperation and non-cooperation, I think it is fair to say that it is quite outrageous for the Government to come to us at the last minute with this kind of request and then put in schedules, such as are going to be shown here, I understand, where they selected a few cities, and ask your Honor to draw inferences from those, when we got now the burden of showing that those are not typical, and we will show it.

(3083)

Mr. Gillespie: Your Honor, on behalf of Loew's I should like to state that by six o'clock last night, Sunday night, the Government had every document which was requested when this court adjourned last Wednesday. On Thursday we received a further request for contracts in some 60 cities. We have been working to get those together. We hope to have them some time today, or part of them some time today. But I do not want Loew's to be left out in the open with regard to the position they have taken about supplying these documents.

Mr. Proskauer: From Warner's they have had every document they called for.

Now, may we be informed what is being offered? None of us know. We don't hear you—

Mr. Wright: Nothing is being offered.

Mr. Raftery: Mr. Shears, could we now have back what you took and did not offer?

Mr. Shears: Yes (handing).

Colloquy

Mr. Raftery: I am sending these back, but I should like the Court to see what they did not use. They used, I think, two contracts in each batch (indicating).

(Marked Government's Exhibits 416, 417, 418, 419, 420, 421, 422 and 423 for identification.)

Mr. Caskey: Mr. Wright, we spent three long hours Friday afternoon assigning numbers to these exhibits.

(3084)

Mr. Wright: We will keep the same numbers, the same order, but the numbers will have to be moved up. I trust that won't be too much of an inconvenience.

Mr. Frohlich: Were those numbers, Mr. Wright, just read off the same numbers we had on Saturday?

Mr. Wright: No. These are the schedules that were just read in. The numbers on the exhibits we had Saturday will be moved up by 8 in each case. 416 will be 424, and so on.

Judge Goddard: What is that about changing numbers?

Mr. Wright: This is material not yet offered on which we are changing numbers. I numbered at the conference on Friday and Saturday the charts that we were going to offer consecutively with the next exhibit numbers. Now, this, having been identified in between, we will have to move those numbers up. That is something that I do not think concerns the defendants or the Court particularly at this time.

Judge Goddard: It is important to have these exhibit numbers right, because when we look for an exhibit and the number does not correspond—

Colloquy

Mr. Wright: We will have them right. This material that he is talking about is material which has not yet been identified.

(3085)

Judge Goddard: The clerk tells me that Exhibits 416 to 423 are schedules; is that correct?

Mr. Wright: Yes. Those are for identification.

Mr. Raftery: Excuse me, Mr. Wright: May I ask a question before you go into that? I worked yesterday examining all of that stuff. Isn't everything you are about to offer already in evidence? All those charts, doesn't that represent something that is already in?

Mr. Wright: I will see when I get to it. I have another document I want to offer.

Now, with reference to the work sheet that we offered while Mr. Maloney was on the witness stand, Fox has supplied us with a sheet which they say is correct, and we will ask to have that marked as Exhibit 404 in place—

Mr. Proskauer: Could we hear what it is that you are offering?

Mr. Wright: We will ask to have marked as Exhibit 404 a tabulation of Fox net profits that were submitted to us by Fox as being correct, which we are substituting for the one identified as 404 to which they objected.

Judge Bright: Have you extra copies of it, Mr. Wright?

Mr. Caskey: We will supply them. We have

(3086)

plenty, and I shall get them.

Mr. Wright: This is the only one that was given to us.

Judge Bright: We have copies of the other, haven't we, 404?

Colloquy

Mr. Wright: I believe you have the one that was marked 404.

I will ask to have marked as 404-A the graph that was prepared.

Mr. Caskey: The last, 404-A, is objected to.

(Marked Government's Exhibit 404-A for identification.)

Mr. Wright: I want to call the Court's attention—

Mr. Caskey: Put a witness on the stand. Don't testify yourself about it.

Mr. Wright: This 404-A is the chart or the graph which was prepared to fit the 404 that we offered. The only difference, if the Court please, between what we offered and what the defendants have offered here is on that figure for the last year; so we added a line to the chart which shows their figure with the dotted line for the last year, and ours is on the heavy line. The difference was accounted for by a charge of some \$900,000 which they reported simply as a reserve for contingencies; so that—

(3087)

Mr. Davis: Who is this about?

Mr. Wright: This refers to Fox.

Mr. Caskey: I know of no principle upon which a chart can be put in evidence to reflect an exhibit which was excluded. 404 was excluded when the witness was on the stand. Now he offers what he says is a chart reflecting the excluded evidence; and I object to it, and I object to any offer without a witness who can be examined on it.

Mr. Wright: I will call Mr. Maloney—

Judge Bright: Isn't there a new exhibit offered now as 404 in place of the old one?

Mr. Wright: Yes.

Judge Bright: What is the difference between that and the one that was offered?

Colloquy

Mr. Wright: That was shown on this exhibit that I just had marked for identification, 404-A.

Judge Bright: There is an objection to the new 404?

Mr. Wright: No. His objection is to the graph. He supplied the new 404 himself.

Judge Hand: Do you criticize the new 404?

Mr. Wright: We accept it with the qualification that we think as to this one year where they show this \$900,000 difference, our figure properly shows the net profit. They simply took a reserve for contingencies and deducted it from the net profit. I do

(3088)

not think it is really worth spending time on beyond attempting to clear up the discrepancy between the witness's work sheet and what is offered here as 404. This chart shows graphically what the difference is, that is all.

Judge Bright: What is the difference between the new 404 and the other 404?

Mr. Caskey: May I explain it, sir?

Judge Bright: Yes.

Mr. Caskey: In the old 404 the accountant had labeled the revenue from 1943 and 1944 as film rental when it was, in fact, not all film rental but also represented the theatre receipts of both the Roxy Theatre in New York and National Theatres Corporation. And our point, and the reason we are objecting to this chart is that from the period 1933 to 1942, inclusive, the figures are of Fox Film Corporation without any theatre interest being consolidated.

Now, in 1943 and 1944 the theatre interests are consolidated, so they are not comparable; and that is why we object to a chart that is predicated on something that is not in evidence.

Colloquy

Judge Hand: I never thought this thing out very much, but when he made that objection before I did not see why it was not right.

(3089)

Mr. Wright: Well, we are accepting his—

Judge Hand: All right, if you are accepting it what is the use of having about three or four exhibits in graphs in here when one is right?

Mr. Wright: I have no desire by this chart to do anything more than to show your Honors the difference between what we offered and what he offered and what we finally accepted.

Judge Hand: Why don't you withdraw one if it does not take something into account, and not leave it there to confuse us. You have to put this in so that the wayfaring man, even though a fool, may not err.

Mr. Wright: If the Court does not think the graph is helpful I will withdraw it.

Judge Hand: All right.

(Government's Exhibit 404-A for identification withdrawn.)

JAMES J. MALONEY, resumed the stand.

Judge Goddard: Mr. Wright, the original 404 was marked for identification?

Mr. Wright: That is right, and that is withdrawn.

Judge Goddard: And you have substituted another 404 for identification?

Mr. Wright: We are substituting this 404 in evidence supplied by the defendant Fox.

Judge Goddard: Has that been received in evidence?

Mr. Wright: Yes.

James J. Maloney—By Plaintiff—Cross

Mr. Caskey: Then 404, the old chart, should be physically destroyed.

Judge Bright: We have marked our copies "No value."

Judge Goddard: Will you have duplicates of this?

Mr. Caskey: Yes, sir, I will in an hour.

Mr. Wright: He is going to supply us with some.

Judge Hand: This is the original, isn't it?

Mr. Wright: Yes.

Direct examination continued by Mr. Wright:

Q. Now, Mr. Maloney, you also took from the SEC a statement of Fox, the excess profits figures that were recorded there. Can you just read those into the record? A. The amounts of excess profits taxes charged in the annual statements filed with the SEC for the years 1942, 1943 and 1944 appeared as, for 1942, \$2,900,000; for 1943, \$20,250,000; for 1944, \$19,800,000.

Q. And when you were on the stand the other day I believe you did not have the Columbia figures. Could you read those in for the excess profits? A. Yes. The amounts of excess profits taxes charged on the annual statements of Columbia Pictures Corporation for the year 1942 appeared as \$370,000; for the year 1943, \$2,970,000; for the year 1944, \$3,645,000.

Mr. Wright: That is all.

Cross examination by Mr. Caskey:

Q. Mr. Maloney, you know now to be a fact that during the last two years to which you refer the figures are the consolidated figures of Twentieth Century-Fox, including National Theatres? A. I was aware that the figures for all years were the consolidated figures as furnished by the corporation to the SEC.

James J. Maloney—By Plaintiff—Cross

(3092)

Q. Yes, but you knew that the corporations consolidated were different? A. The corporations consolidated were different, I believe, in each of the years.

Q. That is correct. So they are not comparable figures? A. The corporation had different subsidiaries during the various years.

Q. So the figures are not comparable? A. That I could not agree to.

Q. And have you ascertained since you are on the stand what the rates of taxation were? A. No, I have not.

Q. Or whether or not there were not sharp increases in the tax rate? A. No, sir, I have not.

Q. Or whether those figures for each of the years are based on comparable tax rates? A. I have not made any research of the income tax rates, sir.

Judge Hand: Mr. Stenographer, don't take this down unless somebody wants it.

(Discussion off the record.)

Judge Hand: Now let Mr. Wright briefly state his position in regard to this, and you answer it just as you have, Mr. Caskey. We have not had all this endless talk on the record. That will make a record.

Mr. Wright: Our position with respect to Exhibit 404 is that when read with Exhibit F-24, I believe it is, previously offered in evidence by Fox, it is the best available picture of the net earnings of both the

(3093)

Fox Film Corporation and its theatre operating subsidiaries during the period in question. It is perfectly clear that the 404, of course, does not reflect any profits of the theatre owning subsidiaries prior to 1942 except insofar as they appear in 404 as dividends paid

Colloquy

by National to Fox. That is because during that period National Theatres was a 42 per cent owned subsidiary of the parent Fox; beginning with 1942 when they had a 100 per cent interest in National Theatres; a consolidated statement was filed for both, and the net profits figures there for the last years on the chart are the net for the entire theatre operating and distributing and producing business.

Mr. Caskey: Have you got F-24, Mr. Marcus?

Judge Bright: Which do you want?

Mr. Caskey: F-24.

(Exhibit handed to Mr. Caskey.)

Mr. Caskey: If the court please, it was my position that the Exhibit 404 is not on a comparable basis, as Mr. Wright has now explained, from the first year through 1942. The statement is a consolidated statement of the income and profits of the Twentieth Century-Fox and its distribution subsidiaries. Commencing in 1943 and for 1944, it is a consolidated statement of Twentieth Century-Fox, its distribution subsidiaries, and in addition National Theatres Cor-

(3094)

poration, the Roxy Theatre, and De Luxe Laboratories.

Prior to 1943 the only income that is shown in the schedule from theatres is the income received as a dividend on the 42 per cent of the stock of National Theatres Corporation.

Now I have in my hand Exhibit F-24, and to make the figures at all comparable it will be necessary to subtract the amount of dividends and add to it the amount of net profits; and since this is an appropriate place, I might read into evidence the profit figures of National Theatres Corporation.

Colloquy

Judge Bright: Is that what F-24 is?

Mr. Caskey: Yes. 1940, two million—

Judge Hand: Reading from F-24.

Mr. Caskey: (Continuing) \$2,033,000;

1941, \$2,404,000;

1942, \$3,402,000;

1943, \$4,490,000;

1944, \$5,156,000.

Mr. Wright: I take it those figures are all after taxes, just as the other figures we had?

Mr. Caskey: Yes. Now, the same argument that I make as to this, applies to the testimony of the witness as to the provision for excess profits tax. In the (3095)

year 1942, it was \$2,960,000. It jumped in 1943 to \$20,250,000, and was slightly less, \$19,800,000, in 1944. In both of those latter years there was, first of all, a higher tax rate than there was in 1942. Second, there was a difference in the method of computing the tax, because when Fox was consolidated with National it got the advantage of National's tax base, or the burden of it; and, in addition, the consolidation, the provision for taxes is for both companies and not just the distribution corporation.

Judge Hand: I think that explains it anyway. Personally I should not think that the figures were comparable, without your correction.

Now, is there any more from this witness?

Mr. Wright: Nothing more from this witness.

Mr. Wright: Now we have some additional exhibits necessary to complete material already in evidence, and I will now offer those. One is a rider

Colloquy.

marked 182-A, which supplements Exhibit 182 in evidence, a contract between Loew and RKO.

(Marked Government's Exhibit 182-A.)

Mr. Wright: I will ask to have marked as 226-A an agreement dated September 1, 1938, between Paramount, Fabian Brooklyn Theatres, Inc., and Stanley Mark Strand Corporation, a franchise agreement which supplements an agreement in evidence as 228,

(3095-A)

which is the pooling agreement referring to the Brooklyn first-run theatres.

(Marked Government's Exhibit 226-A.)

(3096)

Mr. Wright: And I also ask to have marked as 232-A an agreement, a 20-year agreement, dated December 10, 1930, between Paramount Publix and Fox Film, which is referred to and supplements the agreement in evidence marked as Exhibit 232.

Mr. Caskey: Will you read me Mr. Wright's remarks?

(Record read.)

Mr. Caskey: I certainly object to any such characterization. No objection to the agreement as such, but this agreement was made in 1930, it was terminated by bankruptcy, and a new agreement was made with the trustee in bankruptcy. This does not supplement anything, except as an historical record.

Judge Hand: Overruled. This is an original sale that was presumed to continue through bankruptcy.

(Marked Government's Exhibit 232-A.)

Mr. Wright: We again have this problem as to Exhibit 272-A, which is supplemental pages that are,

Colloquy

according to United Artists, properly a part of Exhibit 272. We want it in the record. United Artists wants it in. Fox objected before, and I assume they object, but in view of the position of United Artists, I suppose it will, at least, be admitted as between United Artists and ourselves.

Mr. Proskauer: Could you tell us what you are offering?

(3097)

Mr. Caskey: Unsigned document. We certainly object to it. We have no copy of it.

Mr. Wright: This is the unsigned copy that was furnished to us by Mr. Raftery with the statement that it was an authentic copy of the agreement. We have no other copy.

Judge Hand: Overruled.

Judge Bright: That is the Stage Door Canteen.

Mr. Wright: That contract, I believe, refers to Stage Door Canteen.

(Marked Government's Exhibit 272-A.)

Mr. Wright: Your Honors will recall an Exhibit F-21 was offered by Fox, which showed certain rental tabulations, with respect to the film Sweet Rosie O'Grady in the 92 cities with more than 100,000 population. When the witness was on the stand we asked if he could supply figures as to the total rental in the towns in question and as to the total affiliated rental, and then we asked for that data, and we got, in this document which I will ask to have marked, I think, for convenience, as F-21A—is that agreeable, Mr. Caskey?

Mr. Caskey: Certainly.

Mr. Wright: (Continuing) —the statement that I submit by Fox giving total film rental for the picture in each of the towns. We were not furnished with a

Colloquy

(3098)

statement as to what the total affiliated rental was in each of the towns.

(Marked Exhibit F-21-A.)

Mr. Caskey: May I just place on the record this observation: F-21 shows that the total United States gross on Sweet Rosie O'Grady was \$2,821,000, of which \$775,000 was derived from the first run in these 92 cities having a population of 100,000 or more. This Exhibit F-21-A shows that the total revenue derived from all exhibitions in all theatres in those towns was \$1,301,693.49, which means that \$525,000 was derived from the second and subsequent runs in those towns, if my mathematics is correct. Those are copies of 404 (handing to the Court).

Mr. Wright: I also want to offer additional material that was received in response to, or in answer to, interrogations subsequent to the close of our case, which was used by Mr. Borwick in the tabulations that I am about to offer. The first is a letter from counsel for Loew's, Inc., containing supplemental data with respect to Exhibit 57, which is already in evidence, and I will ask to have that—I believe it is the second supplement—marked as Exhibit 57-B.

(Marked Government's Exhibit 57-B.)

Mr. Wright: And I am offering as Exhibits 139-A and B supplemental data furnished by the defendant

(3099)

Columbia, which supplements Exhibit 139 in evidence.

(Marked Government's Exhibits 139-A and 139-B.)

Mr. Wright: And I will ask to have marked as 57-A this folder marked 57-A, which contains addi-

Colloquy

tional answers submitted by Loew with a covering letter, which supplements Exhibit 57 in evidence.

Judge Bright: Mr. Wright, that 57 carried a number of subdivisions up to dash 38.

Mr. Wright: Yes, it was subdivided in numbers, I think one number for each town covered. These, I think, refer to additional towns. Instead of giving it an additional sub number, I just gave them A and B numbers.

Judge Bright: They do not supplement any one of those particular numbers?

Mr. Wright: No, that is right. It was a general supplement to the interrogatory data.

Mr. Davis, if the Court please, calls my attention to the fact that the covering letter in here refers only to the sheet relating to Portsmouth, Virginia. There are five other sheets in here, relating to New Orleans, Atlanta, Oakland, Columbus and Woodbridge, New Jersey, respectively, which are not covered by this letter, but as to which there is no question as to authenticity, so I am offering them also.

(3100) Mr. Davis: I think perhaps the only inaccuracy in the record, Mr. Wright, would be your statement that those are furnished in response to a later request. I imagine they went forward to you at the time of original delivery.

Mr. Wright: As to that, I am quite sure that these came in recently, and I will endeavor to locate the covering letter.

Mr. Davis: It doesn't make any difference when they came in, I have no objection to their admission, but I don't want the record to be inaccurate.

(Marked Government's Exhibit 57-A.)

Peter M. Borwick—By Plaintiff—Direct

PETER M. BORWICK, called as a witness on behalf of the Government, in rebuttal, being first duly sworn, testified as follows:

Direct Examination by Mr. Wright:

Mr. Raftery: May it please the Court, may I now ask Mr. Wright a question? Are you about to offer what you exhibited to counsel on Saturday?

Mr. Wright: That is correct, plus, I think there were, two or three of these tabulations which were not complete at that time and which—

Mr. Raftery: Which we haven't yet?

Mr. Wright: (Continuing) —you may not have received yes.

(3101)

Mr. Raftery: But will you admit everything you are about to offer now is already in the record in those exhibits in some form or other?

Mr. Wright: With the exception of one or two of these tabulations, all of them are based upon material which is in evidence, that is, they represent either summaries or tabulations of that material.

Mr. Proskauer: Your Honors, I would like to get this clear. I understand that with the single exception that Mr. Wright made, none of this evidence is tendered as new evidence; it is tendered as a compilation of existing evidence, so we have a right to test it by its correspondence with existing evidence.

Mr. Wright: That is right.

Mr. Raftery: Plus the fact, if your Honors please, that we are contending that this is properly trial brief material and we are just wasting the time of the Court in putting in another volume of argument, because everything I examined yesterday is argument and everything he is about to offer, and take up perhaps

Colloquy

another day, is already in the record and is available for anybody to examine, and you can make whatever argument you want out of it. I spent the whole day yesterday going over every one of these documents and I cannot find one that is not already in the record. Now, he did not have the United Artists or Universal

(3102)

material complete, but everything he has in here of the United Artists and Universal is already in-in documentary form. We submit that an offer of proof, or if he will concede that this is not evidence but argument, and put them in one after another—I object to the offer on the ground it is merely repeating what is already in.

Judge Hand: Well, of course, it is argument. The statements of all these tabulators that we have constantly in our litigation are nothing but computations that, if not disputed, or if the Court agrees with it, are supposed to help it to draw certain conclusions. It is not fact evidence of the ordinary sort, of course.

Mr. Raftery: There are very, very important errors in the record.

Mr. Proskauer: It was with that in mind that I wanted to get clear that this was not offered as independent evidence, but as tabulation of existing evidence.

Judge Hand: Yes.

Mr. Wright: Yes.

Mr. Proskauer: On which we shall have considerable to say in brief and argument.

Mr. Caskey: And on the cross-examination.

Mr. Raftery: That is what I was worried about.

Judge Hand: Won't you be able to stay your hand

(3103)

from that and submit some new tabulations?

Peter M. Borwick—By Plaintiff—Direct

Mr. Caskey: What is that number?

Mr. Wright: 416. I am having it marked as 424 because of the intervening exhibits.

(Marked Government's Exhibit 424 for identification.)

Mr. Wright: The copy that you have, I believe, is a photostat with pencil corrections.

Mr. Caskey: No pencil corrections on this.

Mr. Wright: Well, you were told what—your people were told what the corrections were.

Mr. Roskauer: Mr. Wright, we cannot try a case on the basis of what our people were told, and if you have any corrections to make on the exhibit, please make it on the record and tell us what you are talking about.

Mr. Wright: I am talking about the photostat that you have marked as No. 416, which has been marked for identification as 424.

Mr. Davis: Are there any corrections on that? I have a perfectly clean photostat.

(Discussion between Mr. Wright and Mr. Davis, off the record.)

Q. First, will you state your name and address? A. Peter M. Borwick, Washington, D. C.

Q. You are a first lieutenant in the Army? A. That is (3104) correct.

Q. You are attached to the military government branch of the Army? A. That is correct.

Q. And you have been loaned to the Justice Department for the purpose of tabulating the interrogatory material supplied by the defendants in this case? A. Yes.

Q. And you were a civilian in 1940? A. That is correct.

Peter M. Bortwick—By Plaintiff—Preliminary Cross

Q. And at that time you were in charge of tabulating the material furnished by the defendants in this case in response to interrogatories served in 1939? A. That is correct.

Q. Then you again took up the work with reference to the 1945 interrogatories in July of this year? A. That is correct.

Q. And this Exhibit 416 for identification that you have in your hand there is one of those prepared by you? A. That is correct.

Mr. Proskauer: 416?

Mr. Wright: I beg your pardon; 424.

(3105)

Q. Are the figures that are reported there under the respective columns headed RKO; Fox, Warner, Paramount and Loew's, figures which were supplied by those defendants respectively in response to Interrogatory 12? A. Yes, sir.

Q. That is, there was no computation made by you as to those figures? A. Except for the percentages involved.

Q. You computed the percentages and then you put in a figure there that appears below the first five figures headed, "Total paid to Producer-Exhibitors"? A. That is correct.

Q. Those figures were supplied by an addition made by you and that term "Producer-Exhibitors" is one defined in the complaint as referring to the five groups, RKO, Fox, Warner, Paramount and Loew's respectively? A. That is correct.

Q. And in this case refers to rentals paid to them as distributors, is that right? A. That is correct.

Mr. Wright: We offer this 424 in evidence.

Preliminary Cross Examination by Mr. Caskey:

Q. Lieutenant, the figures that you have headed Fox are the figures of National Theatres Corporation, are they not? A. That is correct.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. And you did not include any of the figures for the Roxy theatre? A. If the report you gave us included the Roxy theatre, why was that figure included.
(3106)

Q. Do you know whether or not the Roxy theatre is included? A. Well, I can tell you by looking at the answer to Interrogatory No. 12.

Q. I show you my copy. A. I would say that if the Roxy theatre is not included in National Theatres, of course it is not included.

Q. Do you know whether it is or is not? A. I cannot say offhand.

Q. So that you have no knowledge then as to whether this total figure includes the Roxy theatre or not? A. I do not unless you so specify.

Q. Do you know—you made the chart—do you know whether it does or not? A. No, I do not.

Q. In addition—

Judge Hand: Is this thing going to be in dispute?

Mr. Caskey: Yes, sir.

Judge Hand: Wait a minute. Whether it includes it or not?

Mr. Caskey: Well, I do not see how there can be any question—

Judge Hand: Are you putting in evidence here by a witness who does not know what the exhibit includes?

Mr. Wright: It does not make the slightest difference for our purposes whether it is in or out. We merely took the figure given by them in response to
(3107)

the interrogatory and tabulated it here. I do not believe it was included. As far as we are concerned, it

Peter M. Borwick—By Plaintiff—Preliminary Cross

makes no difference for our purposes whether you include it in the tabulation or whether you exclude it. The overall picture is unchanged.

Mr. Caskey: How can you say that, Mr. Wright, when you know the Roxy theatre plays only Fox product, and certainly pays a very large film rental during the year? The fact is that it is not included. There is no doubt of that.

Judge Hand: All right, if that is true, if it is incapable of refutation, it ought to be admitted here. Is it?

Mr. Wright: We concede it. Yes, it is not included.

Judge Hand: Then do not examine any more about this, or cross-examine.

Mr. Caskey: No, sir, I might lose my stipulation.

Judge Hand: And I presume you have some other fine points.

Mr. Caskey: I respectfully submit that is not even a fine point. I submit it is a very important point.

Q. Again, the figures as to National Theatres Corporation, as your footnote shows, do not relate to the 1943-44 product at all. A. Covers the period December 26, 1943, (3108)

to December 30, 1944, and includes shorts and newsreels, according to this footnote.

Q. And whether it includes 1943-44 product or not, do you know that except by inference? A. Well, the interrogatory asked rentals paid on features released during the 1943-44 season, and again we took the figures as you gave them to us and annotated them with proper footnotes to explain these particular figures.

Q. Yes, but now you take the first column, the RKO figure. That purports to represent, in the second column, the

Peter M. Borwick—By Plaintiff—Preliminary Cross

amount which the RKO theatres paid to Fox on the 1943-44 season, is that right? A. That is right.

Q. \$2,181,000 on the actual 1943-44 product? A. That is right.

Q. But the figure in the first column, under Fox, of \$2,411,000, does not represent that at all, does it? A. Would you repeat—

Q. It doesn't represent what was paid to RKO on the 1943-44 product? A. Well, I have already explained it.

Q. Can't you answer my question yes or no? A. Well, I copied a figure as you gave it to me and with a proper annotation.

Q. Won't you say on the stand that this figure of, \$2,411,000 is not a comparable figure to the \$2,181,000; won't you say that? A. No, I would not say it unless I knew exactly (4109)

what the content of that figure is, and if you in your answer to Interrogatory 12 did not give me the exact description of what that figure purported to be, then I cannot give you the answer.

Q. You know the \$2,400,000 includes shorts and newsreels? A. That is right.

Q. And that the \$2,181,000 does not include any shorts and newsreels? A. Apparently not.

Q. So to that extent they are not comparable? A. To that extent they are not comparable.

Q. You know that the Fox figure includes some figures which were released after October 1, 1944? A. I do not know that.

Q. Well, don't you know from the work that you have done in this case that the 1944-45 product was released commencing about September or October 1, 1944? A. Approximately.

Q. And don't you know from the work that you have done that the National Theatres played that product in the

Peter M. Borwick—By Plaintiff—Preliminary Cross

fall of 1944 and paid for it? A. What product are you talking about?

Q. I am talking about the 1944-45 product that was played in September, October, November and December 1944.

A. Yes, but on the other hand it excludes from that figure the product played the previous fall; in other words, if your (3110)

figure was comparable to the figure given by others, that is, you would have given us a figure on rentals paid for products released only between September 1, 1943, and September 1, 1944. However, since your figure begins on January 1, 1944, you have excluded from your figure the three or four months of 1943, so that what you leave off on one end you include on the other end.

Q. So it is fair to say that during the year from December 26, 1943, to December 30, 1944, that some of this rental relates to 1943-44 product? A. That is right.

Q. Some of it relates—— A. The bulk of it relates to 1943-44 product.

Q. All right. Some of it relates to 1944-45 product. A. A minor part of it, I would say, relates to the '44——

Q. But some of it? A. Well, some of it, or minor part of it, would be more precise.

Q. Do you know how much? A. No. If you give me the figures as to the number of features you released, I could tell you during that overlapping interval.

Q. Some of it relates to 1942-43 product? A. I would say a very small amount of it, if any.

Q. You asked me if I would give you the figures as to the number of features that Fox released. Haven't we both been talking about the product of RKO? Isn't that what we have (3111)

been talking about, the \$2,400,000 figure? A. That is right.

Q. That Fox paid to RKO for exhibiting RKO pictures?

A. That is right.

Colloquy

Judge Bright: When you get all through, how much difference does it make in whole percentage?

Mr. Caskey: I haven't any idea. I will ask the Lieutenant that if he knows.

The Witness: I cannot give you a very precise answer because we do not have the figures except for this period.

Judge Bright: Do you claim it makes any material difference?

The Witness: I personally don't believe that it makes any material difference.

Mr. Caskey: Well, I can only say; generally speaking, that film rentals have increased. I think that the company paid, in general, a higher film rental in October 1944 than it did in 1943, but what I am objecting to and want the record to show is that we are not comparing two identical things.

Judge Bright: What I want to know is whether it makes any difference.

Mr. Caskey: Well, in the aggregate I have no doubt that the \$25,000,000 figure for the year 1944 is higher than the '43 figure.

(3112)

Judge Bright: How much?

Mr. Caskey: Maybe two million dollars. I can find out exactly.

Judge Bright: Two million dollars additional in the three months that he has excluded from the one end to the other end?

Mr. Caskey: No, I say the whole year, because 1944 was the largest grossing year the theatres had.

Judge Bright: You mean two million dollars that you got more than is shown on this, or two million dollars less, or two million dollars more than you have paid RKO, or two million dollars less?

Colloquy

Mr. Caskey: What I mean is that I think that we paid at least two million dollars less for the 1943-44 product of all the companies that we paid during the fiscal year 1943-44.

Judge Bright: You are only comparing the two columns, the RKO column and your own?

Mr. Caskey: That is the only one I have shown on cross-examination.

Mr. Wright: May I say something here, if the Court please? When these interrogatories were propounded, in order to make it possible for them to answer them in the simplest way, we gave them an option to either give us the figures which would exactly cover the season or, if their books were kept on another basis,

(3113)

to give us the figures as per their books for the closest available period. That is the reason for these discrepancies and I submit the different periods are, of course, accurately covered here in the footnotes. There is no question as to what is involved, and, in view of the manner in which this furnishing of this data was handled, I do not think that this cross-examination is proper at all.

Mr. Caskey: It is not the data. It is trying to compare them that causes the difficulty.

Mr. Proskauer: May I suggest, your Honors, that all this exhibit is trying to do is to show the film rentals that were paid by these various companies, and it has no legal significance unless it spells out a pattern of conspiracy. That is what it is offered for. I don't want in all this discussion about whether a thing is comparable and all that sort of thing, to lose sight of those exhibits we put in that set these figures up in correct form and showed, as far as Warners are concerned, that beyond the possibility of argument,

Colloquy

there was no relationship between what we bought from and what we sold to these co-defendants.

Judge Bright: Judge, if they are offered to show an alleged conspiracy, it doesn't make any difference whether there is two million more or two million less,

(3114)

does it?

Mr. Proskauer: Speaking for myself, and not as an admission, and giving you an opinion of counsel, I agree with you. That is why I interrupted because I did not want that discussion about whether that was important to obscure what I think is the real point about these figures.

Mr. Caskey: Judge Bright, you recall, though, that the charge is more than conspiracy, and that charge has been largely abandoned.

Judge Bright: I am not arguing that question. I am arguing the theory that two dollars more or two dollars less does not make any difference on what they offer to prove, but this witness has only offered this chart on the figures which were sent to the Government by the defendants themselves.

Mr. Caskey: That is right, and the figures are not on a comparable basis because they have alternates as to how to furnish them.

Judge Bright: I do not understand he is comparing them on a comparable basis. He is only offering it as a tabulation of what you submitted to the Government.

Judge Hand: Go on, Mr. Wright.

Mr. Wright: Mark this as Exhibit 425.

Mr. Raftery: Mr. Wright, for the record, we did

(3115)

not furnish any of these figures. They were furnished by either Columbia, Universal or United Artists.

Colloquy

Mr. Wright: That is right. These are figures as reported by the five companies whose names appear at the head of the five columns.

Mr. Raftery: The theatre owners.

Mr. Wright: Yes. I take it 424 is received in evidence.

(Marked Government's Exhibit 424.)

Mr. Proskauer: Might I suggest that when your Honor come to look at this also, that you note the very large percentages that the companies pay to themselves.

Judge Hand: Which?

Mr. Proskauer: This one that has just been marked, your Honor, 424 I think it is.

Judge Bright: What was your statement?

Mr. Proskauer: I wanted to suggest, and we will argue this out more, that you note the very large percentages, gross percentages, that the companies pay themselves. Take Loew's, for example. If you look at the Loew column, at the end, at the bottom, you will see that became 46.4 per cent. If you take Paramount and look at the Paramount column, both horizontally and vertically, you will find that is 28 per cent. And so I am merely calling attention to the fact that this includes large sums that were just intercompany transactions.

Mr. Wright: No question about that.

(Marked Government's Exhibit 425 for identification.)

(3116)

Mr. Wright: (Addressing Mr. Seymour) This Exhibit 425 for identification corresponds to the photostats that you have marked as 417.

Mr. Proskauer: Mr. Wright, may I call your attention to a slight addition that I am sure you will

Colloquy

accede to. That footnote No. 4 should have added to it "exclusive of This Is The Army," just as you had it in the other exhibit. Factually that is correct.

Mr. Wright: You are referring now to a footnote on which exhibit?

Mr. Proskauer: The one you are offering. On 424 you did have a footnote "excluded about \$1,465,000 paid for This Is The Army."

Mr. Wright: Yes.

Mr. Proskauer: Just in the interest of accuracy that should be stated on this exhibit also, and it would come properly as an addendum to footnote No. 4.

Mr. Wright: That is agreeable.

Mr. Davis: May I suggest, Mr. Wright, that in the column of Loew's here you show received by Loew from Loew's Theatres \$8,678,852.

Mr. Wright: Yes.

Mr. Davis: Will you agree that that figure is incorrect because it omits the receipts from the Astor Theatre and from the Buffalo theatres, and that the

(3117)

proper figure should be \$9,138,905?

Mr. Wright: That data, I believe, was not supplied to us when the tabulation was made up.

Mr. Davis: That may well be.

Mr. Wright: But we are perfectly willing to have the supplemental statement read into the record with the exhibit.

Mr. Davis: And that, of course, will modify the percentage calculation, which I have not had time to compute.

Judge Bright: What was that corrected amount?

Mr. Davis: The corrected amount is \$9,138,905. And I may say to avoid confusion, in Exhibit 424, a similar figure stated is \$9,282,490. That is due to

Peter M. Borwick—By Plaintiff—Direct

the fact that the figures which entered into 424 are the amounts billed; and the figure which I have just given the Court for Exhibit 425 is the cash received. There is a lag there between the billing and the receipt which accounts for that discrepancy.

By Mr. Wright:

Q. These figures on Exhibit 425 for identification, those are, are they not, the rentals received from the various affiliated theatres and others as reported on statements made by each of the eight distributor defendants in response to interrogatory No. 3, is that correct? A. Yes, sir.
(3118)

Q. And there are, I notice, a number of discrepancies in the table between the amounts reported by these various distributor defendants as having been received from the various theatres listed there that were affiliated with other defendants and the amounts reported as having been paid by them to the same distributors as reported in Exhibit 424. Can you tell us generally what accounts for those differences? A. Well, in Exhibit 425 we did as we did in Exhibit 424, copy the figures as given to us with proper annotations to make it clear just what those figures cover.

Now, it appears from an analysis of these footnotes and answers to these interrogatories that the differences in part, in addition to the one that Mr. Davis explained, is due to the fact that the coverage, the time coverage, varies, and in some instances—now, here in the case of Paramount Exhibit 425 covers a period of March 10, 1945, and Exhibit 424, the footnote says "For accounting purposes as of December 30, 1944." But they reflect the license fees for the pictures released during the 1943-1944 motion picture season.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. Well, in any event, the data you have recorded in the footnotes shows the periods covered, and that, in turn, is taken from the answers themselves, is that right? A. That (3119) is correct, sir.

Mr. Wright: Now we offer 425.

Preliminary Cross Examination by Mr. Caskey:

Q. Lieutenant, the total that the eight producers show as received from Fox was \$22,485,000, is it not?

Mr. Wright: That is correct.

A. I beg your pardon? I am sorry.

Mr. Caskey: Will you read the question.

Q. (Read.) A. Yes.

Q. And the total shown on Exhibit 424 by National as paid to all eight distributors was \$24,200,000? A. No. You say 22 million?

Q. No. I said the total paid to the eight distributors is \$24,200,000. A. You mean paid by Fox National Theatres?

Q. Paid by National to the eight. A. The figure I have got is \$25,000,000.

Q. Wait a minute. You have got to take out all others, don't you? A. Oh yes, I beg your pardon, that is right.

Q. So the discrepancy or the difference, however accounted for, is about \$1,800,000? A. Approximately I should say. I could not tell you unless I calculated it.

Q. That is about 7 per cent? A. I said I would not venture a guess as to the actual percentage unless I calculated it. (3120)

Q. You have set forth a calculation. Look at your Universal calculation of a million seven. You give it 6.6. A. Universal 6.6?

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. I say that a million eight would be about 7 per cent.

A. (No answer.)

Q. All right. Well, you don't know where that 7 per cent is distributed? A. No. As I said before, Mr. Caskey, we made no attempt at reconciling the figures, any difference that existed between those figures. We merely copied them as you gave them to us or as other defendants gave them to us.

Q. That is right. But the sum total of it is that Fox's receipt from the four affiliated groups, taking it together, is slightly less than 25 per cent of its total national gross? A. You mean of the other affiliated groups?

Q. Yes, sir. A. Well, it is right there.

Q. Well, I want to bring it out. A. It is right there in the record.

Mr. Wright: If the Court please, all of these things are apparent on the face of the tabulation. There is nothing accomplished by cross-examination.

Judge Hand: I think you are right. It is not getting anywhere.

(3121)

Mr. Caskey: Very well, sir, if it is clear that commencing with the column on the left and reading across, Fox, the amount there under each one of those five columns is the amount said to be received from the theatre groups.

Q. That is correct, isn't it? A. That is right. Yes.

Q. And by adding the four figures you get the total percentage received from the four groups? A. That is right, or any other groups.

Mr. Caskey: Yes.

Mr. Raftery: May I ask Mr. Wright a question? I just want to be clear on this.

Colloquy

Mr. Wright: Surely.

Mr. Raftery: This column, third from the end, the five circuits paying the next highest film rentals, are they affiliated circuits?

Mr. Wright: I do not believe that they are. The footnote notes where they include a circuit such as Skouras or Randforce about which there might be a dispute. I think that, however, is noted in the footnote.

Mr. Raftery: But, generally, those are independent exhibitors included in that thing?

Mr. Wright: Yes.

Mr. Raftery: And when you get over here to United Artists, 50.3, does that mean from independent
(3122)

dents only or does the 50.3 add the 2.8 —

Mr. Wright: 50.3 is the rental which United Artists showed that it got from the five affiliated circuits.

Mr. Raftery: And the five independents?

Mr. Wright: No, no. What was gotten from the five next highest independents was the figure, for United Artists—I beg your pardon, I read the wrong figures. Your figure for the total rentals received from affiliated theatres is 46.9. Your figure for the next five highest, which are independents, is 2.8.

Mr. Raftery: So it is really 53.1 from independents and 46.9?

Mr. Wright: Yes.

(Government's Exhibit 425 for identification received in evidence.)

Mr. Wright: Will you mark this 426 for identification?

(Marked Government's Exhibit 426 for identification.)

Colloquy

Mr. Caskey: What is the next one?

Mr. Wright: 426 for identification is the one you have numbered 418 without the percentages, because the percentages were objected to by one of the defendants.

Mr. Fröhlich: Do I understand you are taking out these percentages, Mr. Wright?

°(3123)

Mr. Wright: Yes, those were objected to by one of the counsel. This—

Mr. Proskauer: Why don't you just offer it, Mr. Wright? I do not believe anybody is goin to object to it.

Mr. Wright: I offer it.

Mr. Caskey: May we see it as it now exists?

(Exhibit handed to Mr. Caskey.)

Mr. Proskauer: Is this for the 1943-44 season?

Mr. Wright: Yes.

(Government's Exhibit 426 for identification received in evidence.)

Mr. Wright: And would you mark this next one as 427?

(Marked Government's Exhibit 427 for identification.)

Mr. Wright: That is a similar one to 426 but for the 1936-37 season, and it has the average film rentals for the reason computed at the bottom there. I do not believe the computation of the average rental appears on the photostat which you have.

Mr. Proskauer: Irrespective of that, would you let me inquire, with the Court's permission, is the point of these two exhibits—I ask this so we won't be

Colloquy

lost in briefing—that there has been a very large increase in the number of films of the more expensive type? Is that the point?

(3124)

Mr. Wright: That is one point.

Mr. Proskauer: Is there any other point? There is no question about that factually.

Mr. Wright: The other shows the relative box-office quality, which is some indication—

Mr. Proskauer: I don't hear you, Mr. Wright. The relative what?

Mr. Wright: The relative box-office quality of the features released by the eight defendants is also suggested or indicated by the exhibit.

Mr. Caskey: Well, if it is offered for that purpose I certainly object to it.

Mr. Proskauer: I can't object because he shows we are doing so well, in the highest brackets, that we must be producing very good pictures.

Judge Hand: Have you offered this in evidence, 427?

Mr. Wright: Yes, I have offered it.

Mr. Davis: Mr. Wright, as to these percentages here, shall we strike them out?

Mr. Wright: The percentages were stricken, because counsel for one defendant thought they might be misleading. They made no difference to us.

Mr. Davis: I understand they went out of 426. Are (3125)

they also on the way out of 427?

Mr. Wright: Yes.

Mr. Davis: I just want to know so that I can make my exhibit conform.

Judge Bright: They do not appear in our exhibits.

Peter M. Borwick—By Plaintiff—Direct

Mr. Wright: I said they were stricken because of an objection by one counsel.

Judge Hand: Admitted.

(Government's Exhibit 427 for identification received in evidence.)

Mr. Wright: The next one I will ask to have marked as 428 for identification. I think that is your 420.

Mr. Seymour: May I suggest, Mr. Wright, that you have those four which are a part of one group marked together at one time, because I would like to examine them. I mean, mark it at this time, and then I will examine them all.

Mr. Wright: Well, I will go ahead with the examination of these, and then we will get to the other as soon as we can.

Direct Examination Continued by Mr. Wright:

Q. Now, this 428 for identification that you have was prepared, was it not, from the admissions of fact respectively (3126) furnished by the eight distributor defendants? A. That is right.

Mr. Davis: A little louder, Mr. Witness, please, sir.

Q. The exhibit number opposite the name of the distributor is the number of the admission of fact of the particular distributor that was used? A. Yes, sir.

Mr. Caskey: What was that?

Mr. Wright: I said the exhibit number opposite the name of the distributor is the number of the admission of fact of the particular distributor that was used.

Peter M. Borwick—By Plaintiff—Direct

Mr. Caskey: It was not on our copy.

Judge Bright: Is this a substitute for one of your schedules that is in your trial brief?

Mr. Wright: Similar schedules were in the trial brief. This, however, has been expanded to include the 92 cities. The schedule in our trial brief included only 73, and this also has some corrections as to those.

Q. Can you tell us just what you did in preparing the figures that appear in that first column there under Warner?

A. We took Warner's admission of facts and determined what exhibitors got the first-run contracts in the City of New York and indicated the theatre affiliated with Warner as indicated beside New York, New York.

Q. That is, the abbreviations you have under there, (8127)

Warner, Paramount, and so on, in each case indicate the defendant with which the first-run account in question was affiliated, is that right? A. That is correct, sir.

Q. And that information was obtained from the theatre lists in evidence supplied by the defendants? A. Yes, sir.

Q. As to affiliation? A. Yes, sir, that is correct, sir.

Q. Now, that admission of fact, I believe, that Warner gave you showed, did it not, all of the theatres in which any features distributed by Warner had a first run in the town in question during that season; is that right? A. That is correct.

Q. And then you show in some cases the names of two or more exhibitors with the figure "&" between them. Can you tell us what that means with reference to the admission? A. Well, that merely means that the product was split between two or more exhibitors.

Q. And the affiliation of the exhibitors between whom it it was split is indicated there? A. That is correct.

Peter M. Borwick—By Plaintiff—Direct

Q. You did not attempt to show on this table the extent of the split? That is, whether it was 50-50 or $\frac{1}{3}$ - $\frac{2}{3}$? A. That is correct.

Q. And how about the cases where a number of the pictures had their exhibition, or where a few pictures were (3128)

exhibited by one theatre, and the majority, the great majority of the pictures were exhibited by another? What was done there? A. Well, we excluded all pictures—that is, we excluded from the computation any exhibitor or group of exhibitors who exhibited during this season a total of six pictures or less.

Q. That is, if the exhibitor shown on the admission had a first run of only six or less of the season's product of the distributor for that year, that exhibitor was disregarded in building the table, is that right? A. That is correct, sir.

Q. Then your total at the bottom, where you say all independent 15, that is the number of the towns in which the first-run outlets were all independent for that particular distributor? A. That is correct.

Q. And the number 7—there was a split between affiliated and independent theatres? A. That is so indicated.

Q. And the number 70 is the number of towns where the first-run outlets were all affiliated for that particular distributor? A. Figure 7? Do you mean—

Q. The final figure 70. A. Oh, I beg your pardon. I thought you said 7.

Q. In these situations where you have a dash connecting two or more exhibitors' names, those indicate so-called (3129) pool situations? A. That is right.

Q. Now, the information as to the pooling in the town, that was not obtained from the admission of fact, is that right? A. That is right.

Peter M. Borwick—By Plaintiff—Direct.

Q. The pooling data was obtained from other exhibits in evidence which are noted in footnotes at the bottom opposite each pool? A. That is right, sir.

Q. Now, will you tell us that procedure you follow with reference to the Fox column? Was the same treatment followed there? A. Yes, the same procedure was followed in the Fox situation as was carried out in the Warner situation.

Q. And was the same true as to the Paramount admission, the Paramount Company? A. Yes, except with a few exceptions.

Q. What are the exceptions there? A. Well, we eliminate from the computation all so-called Hopalong Cassidys which are considered westerns, and in four situations we made an exception to the rule of six or less.

Q. Which were those four situations? A. One I think was Camden, New Jersey, where during the 1943-44 season Paramount sold eight features to a fellow by the name of Varbalow for exhibition in the Towers and Victoria theatres.

Q. Why did you— A. Oh, I beg your pardon. Those are the only two theatres. I say these were the only two theatres to which these eight features were sold.
(3130)

Q. Do you have the split noted there in Camden? A. No, we do not.

Q. Well, what was the reason for excluding the Camden situation there? A. Wait a minute, I beg your pardon. I show a split. I beg your pardon.

Q. Then Camden is no exception, is it? A. Camden is no exception, that is correct.

Q. What, if any, exceptions are there? A. We showed an exception in the case of Loew's—

Q. I am confining your testimony to Paramount. Were there any exceptions as to the treatment used? A. I beg

Peter M. Borwick—By Plaintiff—Direct

your pardon. The exception was made in the case of Cleveland, Ohio.

Q. What was the situation at Cleveland? A. Well, in Cleveland the regular first-run account of Paramount was Loew.

Q. Yes. A. And in addition Paramount sold four pictures to the Circle Theatre, one picture to the New Broadway Theatre; one picture to the Windemeer Theatre; one picture to Windemeer and Commodore theatres; one to the Lorein-Fulton Theatre, I think it is, and one to the New Broadway and Commodore, and one to the Hilliard Square Theatre, for a total of ten features.

Q. Now, why did you exclude these outlets from your tabulation? A. Well, one reason was that we did not believe that these theatres constituted regular first-run accounts.

(3131)

Q. Why not? A. In view of the fact that RKO, Warner and Loew theatres in that town had clearance over these theatres I just mentioned.

Q. Did you compare those with that list of first-run theatres that were submitted by Mr. Rodgers on behalf of Loew? A. That is right.

Q. Were any of them on that list? A. No, they were not.

Q. Now, were there any other exceptions? A. In the case of Paramount?

Q. Yes. A. Norfolk, Virginia.

Q. What was the situation there? A. Well, Paramount licensed one feature to the Roxy Theatre; six to the Rosna or Rosne, I am not sure which; five to the Center Theatre.

Q. Why did you exclude those theatres? You say Norfolk? You show the Paramount product is divided there between the Loew independent pool and the independents,

Peter M. Borwick—By Plaintiff—Direct

do you not? A. I beg your pardon, I am sorry. This computation is not applicable.

Q. There was no exception made as to Norfolk, is that right? A. That is correct, sir.

Q. Well, were there any other exceptions as to Paramount? A. Pittsburgh, Pennsylvania.

(3131a)

Q. What was the situation there? A. Paramount licensed two to the Harris Senator Theatre; one to the Art Cinema Theatre; one to the Hilltop Theatre; two to the Colonial, and one to the Arcade, for a total of seven.

(3132)

Q. And why were those independent outlets excluded from your Paramount column? A. Well, one reason was that the theatres in the Loew-Warner pool had clearance over these theatres.

Q. Now, that was not true of the Harris, was it? A. Well, I would not be absolutely sure unless I check it. (Checking) Well, it would appear from Paramount's answer 6 to 11 that the Loew's Penn., Stanley, Warner, Ritz theatres got clearance over all other theatres in Pittsburgh.

Q. Well, did you check those theatres against Mr. Rodgers' list? A. Yes, sir, I did.

Q. Which, if any, of those appear on his list as a first-run theatre? A. Pardon me just a moment.

Two of those theatres Loew in its Exhibit 13 includes as regular first-run theatres.

Q. Which ones? A. One is the Harris Senator, and the other is the Art Cinema.

Mr. Davis: Say that again, please.

The Witness: I beg your pardon. I said that Loew in Exhibit No. L-13 includes the Art Cinema and the Harris Senator Theatres as regular first-run theatres.

Peter M. Borwick—By Plaintiff—Direct

Mr. Davis: Where?

The Witness: In Pittsburgh, Pennsylvania.

Q. And how many of the Paramount pictures released during that season did those two theatres get? **A.** The Harris (3133)

Senator got two and the Art Cinema got one.

Q. Well, were there any other exceptions in computing the Paramount column? **A.** No, there were not.

Q. How about as to Loew? Did you follow the same method there? **A.** Yes, we followed the same procedure.

Q. Were there any exceptions? **A.** Yes.

Q. Where were they? **A.** In the case of New York City, Loew's sold three features to Radio City Music Hall and we considered that as a split and included the independent along with Loew's Theatres.

Q. Why was that? **A.** Well, in New York it appears that the practice of these defendants is to sell pictures to the Radio City Music Hall in small blocks or even in individual pictures; and I think it has been testified to that all these defendants seek to get Radio City Music Hall as a first-run account.

Q. Well, in any event, the playing time represented by three pictures in a first-run in New York is much greater than that represented by six in any of these other communities, is that right? **A.** I should think so.

Q. Now, any other exceptions? **A.** In the case of Loew's?

Q. Yes. **A.** No, there was not.

Q. Now, as the RKO, what if any exceptions to that procedure did you make? **A.** Let me check just a moment, sir. In the case of Pittsburgh, Pennsylvania—

(3134)

Q. What was the situation there? **A.** In Pittsburgh, RKO licensed 12 pictures to the Barry Theatre in that town.

Peter M. Borwick—By Plaintiff—Direct

Q. That theatre, that was on Mr. Rodgers' list, was it?

A. Yes, it was.

Q. Why was that excluded. A. For several reasons.

One, we did not believe it was a first-run account, because it appears from an examination of the answers to the interrogatories of all defendants that the only other defendant that sold pictures during that season to Skirball—that is, he owns this Barry Theatre, he owns or operates it—was Warner, who sold him three features. Furthermore, the Loew-Warner pool theatres in this city have clearance over all other theatres.

Q. Now, were there any other exceptions? A. To the best of my knowledge I do not believe there was.

Q. As to RKO? A. RKO or any of the other defendants.

Q. Now, as to Universal and United Artists, the admissions of fact were in a somewhat different form, were they not? A. That is correct, sir.

Q. In those cases they simply gave a general statement as to who the first-run account was during the entire period from 1936-1937 through 1943-1944, is that right? A. That is correct.

Q. They did not show the distribution of individual (3135)

pictures in the towns in question in any of the seasons in question, is that right? A. That is right.

Q. So your data there is just taken as it was reported?

A. Yes.

Q. Now how about Columbia? A. Columbia provided admissions of fact which merely gave the regular first-run account, according to my best recollection.

Q. And you simply took their statement as to which was the regular first-run account? A. That is right.

Mr. Wright: We offer 428 in evidence.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Mr. Proskauer: May we ask a few questions preliminarily?

Judge Hand: Yes.

Preliminary Cross-Examination by Mr. Proskauer:

Q. Lieutenant, Warner is in the first column, so I will talk to you first: As to all of these defendants and all the people shown on this chart, you arbitrarily omitted all accounts to which they sold fewer than six pictures, is that right? A. Six or less.

Q. Six or less? A. That is right.

Q. Now, why did you do that? A. Well, I think, as I understand it, the original request made to the defendants consisted of a list of theatres which constituted the regular first-run accounts.

Q. And you arbitrarily decided that if Warner was selling an independent theatre first-run anywhere in America (3136)

six pictures, which is somewhere around a third or a fourth of its entire production, that you were going to exclude that in your computation; is that what you did? A. Well now—

Q. Now, just answer that yes or no. Didn't you do that?

The Witness: Will you repeat the question?

Mr. Proskauer: With the Court's permission, may the reporter read it?

(Question read.)

A. Well, if you mean by the question that we arbitrarily excluded theatres because it is Warner's—that is, independent theatres sold by Warner because it is Warner, I would say no. I am not sure that I understand your question.

Q. Have you got the material there showing the number of independent theatres that Warner sold first-run in amounts of six or less? A. Yes, we do.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Mr. Wright: Exhibit 129,

Mr. Proskauer: All right, we will get that later.

Q. Now, take Buffalo, for example: You knew, didn't you, and your records showed that we sold six first-run pictures in 1943-1944 to the Buffalo 20th Century, which was an independent company, operating the Century Theatre?

A. I will tell you in just a moment, Mr. Proskauer. Would (3137)

you kindly tell me what page it is on?

Q. What page? A. Yes, this admission of fact. I take it you have got that in your hand.

Q. Page 9. A. Yes, we omitted that because it was six or less.

Q. Do you know that Warner produced 19 pictures that year? A. That is correct.

Q. And you thought it was fair to try to give the Court the impression that we did not sell first-run to independents to make up a schedule arbitrarily omitting a sale of approximately a third of our product to an independent theatre in a great city like Buffalo?

Mr. Wright: If the Court please, that question is objected to. There has been no attempt to show that they did not sell independents in these towns. What the table purports to show is who the regular first-run account was that showed pictures of these distributors.

The Court: The question is all right. Overruled.

Judge Goddard: Is there anywhere on these schedules anything to show that less than six pictures are not included?

Mr. Wright: Why, his testimony, I think—

Judge Goddard: Is there anything on here?

Judge Bright: He does not show the cities on this schedule in which such exclusions were made.

Peter M. Boricick—By Plaintiff—Preliminary Cross

(3138)

Mr. Wright: I think he testified generally that as to all these cities, in dealing with the first five columns there, he excluded the situations where six or less were sold, with such exceptions as he noted.

Q. You cannot answer that question? I am leaving it to you. You are a lawyer, are you? A. No, sir.

Q. An accountant? A. No, sir.

Q. Formerly attached to the Attorney General's office?

A. No, sir.

Q. Are you an accountant?

Judge Bright: He said he was a first lieutenant.

A. No, I said I was not an accountant. If you ask me what my occupation was, I can answer your question.

Q. I do ask. A. Economist and statistician.

Q. Economist and statistician? I am putting it to you as an economist and statistician whether you think that it was a fair use of statistics to create this document and just arbitrarily leave out what you have told us you left out? You can answer that yes or no, and I will take your answer either way you give it. A. I cannot answer it yes or no, but I can explain the basis for this elimination.

Q. You have explained all that I think you care to say—have you got anything to say, in explanation of it, other than what you have already told us? A. Yes. It appears that any split, whether it is between two defendants, two affiliated

(3139)

theatres, or between an affiliated theatre and an independent theatre, takes the form of a split of fifty-fifty or two-thirds and one-third. Now, in the case of Warner, one-third of 19 would be $6\frac{1}{3}$, I would take it. Is that correct.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. Well, I think so. A. All right. However, in the case of seasons—

Q. I think, the Court will take judicial notice of that A. (Continued) —in the case of seasons you note on charts 429, 430, or subsequent exhibits, or subsequent documents which will be marked in evidence, we used the same basis of elimination, that is, six. If you go back to the 1936-1937 season, Warner Bros.—I think it was about 50 features—60 features—a one-third split of that would have been 20.

Q. 60 features? A. That is right, 1936-37, Warner produced 36—60 features. I beg your pardon. A one-third split would have been 20. Yet, on the theory that a split of anything other than, or less than, one-third does not constitute a regular first-run account, I think that you certainly got to—

Q. All right. Have you given all the explanation that you care to make to the Court as to your conduct in making this arbitrary omission? A. That is all I can think of at the (3140) moment.

Q. I will take that and let the record stand at that and just ask you one more question. If I count correctly, in the figure 70 at the very end of column 1, where you say "Total affiliated first-runs" you have included 27 instances in which Warner played its pictures in its own theatres? A. I imagine if its own pictures were played in its own theatres, they would be included in here. I do not know what the exact number is offhand.

Q. The exhibit will substantiate my mathematical accuracy, as long as you tell us that you have included in total affiliated first-runs all cases where Warner played its own pictures in its own theatres, and you do so tell me. A. Yes.

Mr. Proskauer: That is all.

Peter M. Borwick—By Plaintiff—Direct—Prelim. Cross

Direct Examination Resumed by Mr. Wright:

Q. Just one question on Warner, before you go to the next one. As a matter of fact, Lieutenant, if you had taken for Warner a three-picture division for that 1943-44 season, you would have exactly the same figures as you have there except for Buffalo, would you? A. Yes, that is correct.

Mr. Wright: That's all.

Preliminary Cross-Examination by Mr. Davis:

Q. Lieutenant, turn to the Loew column here and look (3141)

at the line for Los Angeles, where you have marked "Fox and Loew." That indicates a product split, does it not?

A. That is correct.

Q. Where did you get the idea that there was a product split in Los Angeles? A. Let me have Exhibit 58.

Mr. Wright: I think I can save time. I think that Mr. Davis is right, that there should be a dash between Fox and Loew, rather than an "and", because—

Mr. Davis: That is not what I am talking about.

Mr. Wright: (Continuing) —because that was a Fox and Loew pool.

Mr. Davis: The facts are that in Los Angeles, while we own a theatre, we do not operate it. It is leased to Fox, and our only relation is as landlord of the theatre, and we are charged in this as splitting the product.

Mr. Wright: I think I can clear this up by saying that so far as we are concerned, I do not believe there is any such charge. We do treat as pool situations, or have treated for our purposes, those where one defendant owns the theatre and leases it to another for operation. There is no dispute as to the

Peter M. Borwick—By Plaintiff—Preliminary Cross

basic facts. I think it is only a matter of language that we are talking about, as far as I can see.

(3142)

Mr. Davis: I would like to know by what authority that is treated as a pool. Certainly a landlord of real estate has a right to lease it to anybody he chooses without entering into the business of his tenant.

Mr. Wright: There cannot be any question about that.

Mr. Davis: Then, all right, if it is agreed this is incorrect as to Los Angeles, we will pass to San Francisco.

Mr. Wright: On our tabulation I would say it should be with a dash instead of an "and" —

Mr. Davis: I say it should be neither.

Mr. Wright: (Continuing) —and a footnote to the theatre list shows the precise relationship between Loew and Fox in the theatres in question.

Q. Let us pass to San Francisco. You have a charge here, or, rather, you have a line which indicates Loew-Fox-Paramount. Are you suggesting that there is a pool of those theatres in San Francisco?

Mr. Wright: Certainly there cannot be any question but that the answer is Yes to that, and I think there is a footnote reference to the exhibits on which we rely to establish the joint relationship of the defendants in question in those theatres.

Mr. Davis: The point I am making, Mr. Wright, is your witness comes on the stand and says this is

(3143)

a correct report of what the exhibits contain. I say it is not a correct report of what the exhibits contain. I say there is no pool in San Francisco. I say that in San Francisco the only theatre we own has been

Peter M. Borwick—By Plaintiff—Preliminary Cross

leased and we have no participation whatever in its operation or receipts.

Mr. Wright: Again, the facts as to the relationship are set forth in Exhibits 231, 232, 233 and 222, which are cited in the footnote.

Mr. Davis: Are you asserting that those exhibits support the statement which your witness has made in his schedule?

Mr. Wright: Yes, we are.

Mr. Davis: Well, I deny it.

Q. Will you point out, Mr. Witness, what the exhibits show as to San Francisco,

Mr. Wright: If the Court please, I think we can shorten this again. Those exhibits make it appear that the theatres owned respectively by Loew and Paramount and Fox in San Francisco are all operated by Fox. Now, there is no dispute between us as to those facts. Again, it is simply one of characterization. For our purposes we have collected those joint interests and for convenience referred to them as pool situations. By any other name the relationship of
(3144)
course remains exactly the same.

Mr. Davis: I appreciate Mr. Wright's chivalry in coming to take the place of his witness on the stand. I am merely testing the witness, who has presented this as an accurate picture of the theatre situation.

Judge Hand: Go on and answer.

Mr. Davis: It is either right or it is wrong, and there is no reason why it should be represented here by symbols which are supposed to indicate a certain relationship between these defendants when the relationship does not exist at all, and a misrepresenta-

Peter M. Borwick—By Plaintiff—Preliminary Cross

tion by symbols is just as much a falsity as a misrepresentation by words. That is my position about it.

Judge Hand: Can you answer this question?

The Witness: I am afraid I cannot.

Q. All right, I will ask you one more and then we will—I have some others, but I will stop with one more. Take Paterson, New Jersey: What does your schedule indicate about the Loew films in Paterson, New Jersey? A. It indicates a Paramount-Warner pool.

Q. And that Loew's films are licensed to a Paramount-Warner pool? A. That is correct.

Q. Does it take any account of the fact shown by previous testimony in this case, that Loew's films in Paterson are divided between Warner and Adams and the independent (3145)

exhibitor? A. I am not sure about that.

Q. Well, I ask you whether your schedule indicates that, this schedule, this Exhibit No. 428? A. No, this schedule does not indicate the name of the theatre.

Q. Does that indicate licensing of films to any other exhibitor than an apparent, speaking by the schedule, Paramount-Warner pool? The answer is it does not? A. I am sorry. Will you read the question?

(Question read.)

A. I don't know.

Q. Let me give you one more. I will break my promise, and just mention one more here. Houston, Texas: What does your schedule, Exhibit 428, show as to the Loew films in Houston, Texas? A. Shows that they are exhibited in Loew and Paramount theatres or theatres affiliated with Loew and Paramount.

Q. Isn't it a fact that all Loew's first-run theatres in Houston are exhibited—licensed to Loew's own first-run

Peter M. Borwick—By Plaintiff—Preliminary Cross

house? You have been over the papers. Isn't that right. A. I know, but you—I am sorry, I did not get your question. You said "first-run theatres."

Q. Isn't it a fact, as shown by the evidence and by the documents you have been over that Loew's films in Houston are licensed to Loew's own first-run house alone and that there is no split with Paramount? A. No, this shows there (3146)

is a split with Paramount.

Mr. Wright: That can be resolved by—have you got exhibit 58?

Mr. Davis: Just a moment, Mr. Wright. I am speaking now, not of what Exhibit 428 shows, but of what the documents on which it is built will exhibit.

Mr. Wright: That is what I am trying to refer to. Exhibit 58, I believe, is the Loew's admission which will show what Loew said about where its pictures played.

Mr. Davis: That is all I want to ask him.

Judge Hand: We will adjourn until 2:15.

(Recess to 2:15 p. m.)

(3147)

AFTERNOON SESSION.

The Court: Now let us move along. We have spent a very long morning, without any intermission, making corrections, and stuff like that, which I think ought to be agreed on between the parties in advance.

Mr. Caskey: Mr. Wright was told about these objections Friday afternoon and refused to make the changes.

Mr. Wright: Now that is an utter misstatement of fact.

Mr. Seymour: If your Honor please, the difficulty has been that we saw these for the first time late Fri-

Peter M. Borwick—By Plaintiff—Preliminary Cross

day. We checked them to some extent. They are not strict rebuttal material. It is really material that should have come in on the direct case.

Judge Hand: I think that is true.

Mr. Seymour: So we are doing the best we can.

Mr. Wright: The material itself, if the Court please, was all outlined in the appendix which was served on them September 20th. Now of course the additional material that was added here was not available then because the data on the additional cities necessary to complete the 92 did not come in until after our case was closed. We made every effort to give them the material in advance.

PETER M. BORWICK, resumed the stand.

Mr. Seymour: I just have a couple of questions on
(3148) this.

By Mr. Seymour:

Q. Referring to the Paramount column, there are in that column some 48 theatres in which Paramount has an interest which shows Paramount product first-run, isn't that so?

A. Well, I can't say offhand. I did not count—

Q. Subject to correction, it is approximately 48, isn't it?

A. I would say somewhere in the neighborhood of that figure.

Now, referring to the first entry in the column under the heading, "Paramount," what is that intended to mean, the word "Par." opposite "New York, N.Y."? A. It merely means that Paramount licensed its feature pictures to theatres affiliated with Paramount Pictures, Inc.

Q. In the City of New York? A. In the City of New York.

Q. And does New York, N.Y., include the five Boroughs?

A. No. That includes Manhattan, first-run New York.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. That is not made clear, is it? A. Well, first-run New York is first-run New York—

Judge Goddard: Will you speak a little louder, please.

The Witness: I beg your pardon.

A. (Continuing) I say first-run New York is first-run New York City.

Q. Isn't it a fact that the admissions of fact show that in (3149)

Manhattan, which is only one of the five Boroughs of New York, N.Y., Paramount Pictures were shown first-run not only in the Paramount theatre but also in Loew's theatres and in independent theatres in the Borough of Manhattan?

A. The only way I can answer that is by checking the original exhibit. Would you kindly get that, please? (Exhibit handed to witness.) Yes, there is ~~one~~ feature picture licensed to the Macon Amusement Corporation for exhibition first-run in the Criterion theatre. I think that is a Loew theatre.

Judge Hand: Why did you limit this to Manhattan? Just because you were told to?

The Witness: No, sir, because Manhattan has clearance over Bronx, Brooklyn, Richmond, Queens and surrounding area.

Q. Wouldn't it have been correct, then, to indicate, when you say New York, N.Y., that it is only the Borough of Manhattan? A. To be absolutely precise, I imagine so. We can make that correction.

Q. Yes, you can easily make corrections—

Mr. Wright: If the Court please, there is no need for any correction. First-run in Manhattan is first-run in the entire City of New York. That is where the first-run occurs, and it has clearance over all the rest of the area.

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(3150)

The Court: All right. Let him go on with his cross-examination.

By Mr. Seymour:

Q. Now, would you go on, please? Aren't there features licensed to others first-run in Manhattan in addition to the Paramount theatre, in addition to the one you have already mentioned? A. There are four features licensed to Bobby-Dick, Inc., for first-run in the Globe theatre. I don't know who operates or runs the Globe theatre offhand.

Q. You just excluded those because you thought it would be a good idea? A. No, sir.

Q. Why was that, because there were less than six? A. I would say that that was an inadvertent omission.

(3151)

Q. Were there some other features licensed by Paramount in theatres other than the Paramount Theatre in Manhattan? A. There were two features licensed to City Enterprises Corporation for exhibition in the Victoria Theatre. Offhand I don't know whether that is a Loew theatre or not.

Q. Is that another inadvertent omission? A. Well, I said that the entire total of—now, wait a minute.

Q. I am told it is not a Loew theatre. I do not know the fact. A. That is a Loew theatre, according to Exhibit 163.

Q. Loew's counsel shake their heads. I don't know. A. There is 163.

Q. Anyhow, you considered it a Loew theatre but you did not show licenses to Loew in your entry under Manhattan, isn't that so? A. The way this thing should have read is "Paramount and Loew."

Q. Why shouldn't it also have read "and independent"? A. No, because the total number of independents licensed here is less than six.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. Will you look at your reference to Bobby Dick again? How many does your copy of the admission show to Bobby Dick? A. That is four.

Q. Doesn't it show five? A. It does not.

Q. So what you say is that there were only six to independent (3152)

pendents and therefore you left them out; is that it? A. Now, wait a minute, wait a minute. You have two feature motion pictures licensed to United Artists Theatre Circuit and Paramount Pictures, Inc. for exhibition in first-run Rivoli. Well, that is two plus eleven, thirteen. That leaves only two licensed to—I mean, four licensed to independents.

Q. You gave us four as to Bobby Dick and two—A. You see, there is one licensed to the Rivoli.

Q. What you say is you have left out reference to the independents on the ground that there weren't six? A. That is correct.

Q. According to your figures? A. That is right.

Q. And you inadvertently omitted the other one? A. That is correct.

By Mr. Caskey:

Q. Will you look at Richmond, Virginia, under the Fox column, about one-third down. A. Yes, I have it.

Q. You show there independent and Loew Independent. A. That is right.

Q. Meaning that some pictures were licensed to an independent and more than six pictures were licensed to a theatre in which Loew and an independent had an interest?

A. That is right.

Q. I show you Exhibit 44 for Richmond. Have you got it (3153)

there? A. That is correct.

Q. How many pictures were licensed to the group that you designate as Loew-Independent? A. It doesn't say the number.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. Sir? Got the answer? A. Oh, wait a minute, wait a minute. Yes, I have it.

Q. How many were licensed? A. It does not say the number that was licensed to an independent.

Q. Well, I didn't ask you that. I said, how many were licensed to this group that you described as being Loew-Independent? A. Four.

Q. But you put that on your list, didn't you? A. That was included inadvertently.

Q. The exhibitor, as shown here, just follow me, Twentieth Century licensed to W. & V. Company, Inc., J. D. Eagan, four features for exhibition at the National and Park theatres first run. That is Wilmer & Vincent, isn't it? A. I understand that to be a Loew-Wilmer & Vincent pool.

Q. Just answer my question. That is Wilmer & Vincent? A. No, I don't know whether it is Wilmer & Vincent.

Judge Hand: Where is this?

Mr. Caskey: Under Richmond, Virginia.

Judge Hand: Oh, still Virginia?

Q. Well now, Mr. Borwick, at the heading you have (3154)

this title, "Exhibitors holding first-run contracts with defendant distributors," is that correct? Did I read that right? A. That is what it says, yes.

Q. Now, this chart does not purport to show any such thing, does it? A. I beg your pardon. That should read "Exhibitors"—

Q. "Exhibitors holding first-run contracts with defendant distributors." That is the way it reads, isn't that right?

A. I beg your pardon. That is right.

Q. Now, it does not show any such thing, does it? A.

A. How do you mean that?

Q. Stick to Richmond. There is no contract that you have seen in evidence with Loew's for the exhibition of any

Peter M. Borwick—By Plaintiff—Preliminary Cross

pictures in Richmond, is there? A. No, I haven't seen the actual contract.

Q. And the admission of fact is that we licensed four pictures to Wilmer & Vincent. Now, from some other source you say that Loew's have an interest in that theatre and so you show a chart indicating that Loew's has a contract for first-run pictures in Richmond, is that right? A. This Exhibit 163 shows the National Theatre as one in which Loew has an interest.

Q. Yes, that is right, but there isn't any contract with Loew's for any pictures? A. As far as I know, there is.

(3155)

Q. You know to the contrary, don't you? The admission of fact is the only evidence that you have, isn't that so?

A. Well, this W. & V. Company is an affiliated of Loew's.

Q. You know that to be a fact? Are you testifying to that either of your own knowledge or what you know to be in this record? A. I believe so. Get Exhibit 15, please.

Q. Let me illustrate it. Take San Francisco. There you show Loew-Fox-Paramount. You do not contend that there is any contract with Loew for the exhibition of Fox pictures in San Francisco, do you? A. Either with one or more of these defendants in the form of an operating company or some company affiliated with one or more of these defendants.

Q. Just sticking to San Francisco and Loew, do you contend that there is in evidence any contract between Loew's and Twentieth Century-Fox licensing Fox pictures in San Francisco? Just that question. A. I can't answer that. I haven't seen the contract.

Q. Do you contend that there is any contract with any corporation in which Loew's has an interest? A. I believe so.

Q. What is the name of the corporation? A. (No answer.)

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. Don't you know, Mr. Borwick, that Fox licenses its pictures to its own subsidiary in San Francisco?

(3156)

Mr. Wright: If the Court please, I don't think there is any question about the fact that only—

Mr. Caskey: I am cross-examining, Mr. Wright.

Mr. Wright: Just a moment. There is no contention on our part at all with respect to any situation where a pool is shown as the exhibitor that the license contract for the first-run films in question was made with more than one. The license contract in any event would be with the one who operates the theatre. The only thing that the pool indication there shows is that theatres affiliated with the exhibitors mentioned there were jointly operated as first-run outlets for the product in question.

Mr. Caskey: Well, but the heading—

Mr. Davis: I may ask Mr. Wright by what authority he says that Loew's is a member of the pool in San Francisco.

Mr. Wright: The authority for that statement is the evidence referred to in the footnote there which shows that Loew's leases its theatre to Fox for operation there along with the Paramount theatres in San Francisco and the Fox theatres. All three theatres are operated by Fox as first-run outlets in the town. The contracts are admittedly made with Fox, the film contracts.

(3157)

Judge Hand: Well, it is the same old question raised before, as I understand it—

Mr. Caskey: Well, your Honor, in the first place

Judge Hand: —as to whether a landlord and tenant relationship under these circumstances is the equivalent of a pool; isn't that it?

Peter M. Borwick—By Plaintiff—Preliminary Cross

Mr. Wright: Precisely.

Mr. Davis: Do I understand Mr. Wright to contend now that that is the equivalent of a pool; to lease a theatre, as we have in San Francisco, having no contract other than landlord and tenant, that that constitutes a pool? I would like Mr. Wright to answer that and say that that is his position, because then we will know what we are shooting at.

Mr. Wright: As far as we are concerned, we used the term "pool" as one short word to describe a variety of relationships. One of those relationships is a situation where one of the defendants owns a theatre and leases it to another; another such situation is where they both own the theatres and have an operating agreement under which the profits and losses are shared; another is where they each own stock in a corporation.

Judge Hand: I know. Any kind of association you claim is a conspiracy under all the circumstances, no matter what form it took?

(3158)

Mr. Wright: Yes. We use the word "pool" to cover all of those situations.

Mr. Davis: If the Court please, I submit the word "pool", legally speaking, as used by Mr. Wright, has no significance whatever.

Mr. Caskey: I just want to challenge the statement Mr. Wright made. I said there was a provision for leasing the Loew theatre in San Francisco, and then he used these words, according to the best of my memory, along with the Paramount and Fox theatres. Now there is no such agreement in evidence.

Mr. Wright: By "along with," I meant only that both Loew and Paramount executed leases with Fox for their respective theatres, and all of the theatres of all three are operated by Fox as first-run outlets in the town.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Mr. Caskey: Now, Mr. Wright, can it be conceded—maybe this will shorten it—that in these so-called pool situations which you have listed, where you have a hyphen here, that the contract, the license agreement, was made with the operator of the theatre as specifically shown in Exhibit 44?

Mr. Wright: Obviously.

Mr. Caskey: All right; and is not made, in the case of San Francisco, with either Loew's or Paramount?

Mr. Wright: The exhibit is not intended to contradict in any way any fact that may appear in underlying evidence.

Mr. Caskey: All right.

By Mr. Caskey:

Q. Now, Lieutenant, when we come to Jersey City, you show Warner, RKO, Skouras. Now why is RKO included?

A. Well, I think footnote 12 would indicate the exhibit which would explain that.

Q. Did you put those footnotes on? A. Those footnotes were put on by Mr. Wright.

Q. And you had nothing to do with it? A. That is right.

Q. And you don't know whether they are right or wrong?

A. I assume they are right.

Mr. Wright: Thank you.

Q. Now, do you know that the pictures were licensed in Jersey City to Skouras under a franchise in 1931, four years before RKO acquired any interest in the Skouras theatre?

A. I did not know that.

Q. And you did not read Exhibit 12 in preparation for your testimony? A. As I said, I did not mark the footnotes.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. Now, when you get down to Elizabeth, New Jersey, what basis is there for saying RKO and Warner? A. Elizabeth, New Jersey?

Q. Fourth from the bottom. A. May I have Exhibit 44? (3160)

(Exhibit handed to witness.)

Q. 44 shows it was licensed to Skouras Theatres Corporation, doesn't it? A. Yes, I believe that Stanley theatre is a Warner theatre.

Q. What is the Stanley theatre? And assuming that, what is the RKO theatre? A. Well, I imagine the State theatre is the RKO theatre.

Q. Don't you know that is a Skouras theatre? A. Well, it is a Skouras theatre, yes.

Q. Well, up here, in Newark, you put Skouras, didn't you? A. Yes, we did.

Q. And in Jersey City you put Skouras, didn't you? A. Yes, sir.

Q. Now, what is the justification for leaving it out when you come to Elizabeth then? A. I do not know. Perhaps again it was due to inadvertence.

Mr. Caskey: I hope your Honors will not receive this exhibit in evidence.

Mr. Leisure: May I ask the witness just a couple of questions?

Judge Hand: Yes.

By Mr. Leisure:

Q. Lieutenant Borwick, the record here, RKO's answer to the Government's request to admit facts, the record shows for this 1943-44 season RKO licensed Warner and Loew's in (3161)

Pittsburgh. That is shown on your chart here under RKO in line 8, is it not? A. That is correct.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. Now I think you testified this morning that your first-run—you say the first-run contracts as used in this chart do not include the contracts for six or less pictures? A. That is correct, sir.

Q. It is a fact that RKO's answers do include in many instances licenses to independent theatres for less than six pictures? A. I could not give you a definite answer unless I checked the record.

Q. Well, without spending time on it, just let me refer you to this same one that we are talking about here in the Pittsburgh situation. You have shown Pittsburgh on your chart, haven't you, as to being Warner and Loew's? A. That is correct.

Mr. Wright: If the Court please, he also covered it in his direct testimony and explained exactly what he did in that situation.

Mr. Leisure: If you will just be patient with me, Mr. Wright, I will only take a minute.

Q. It is shown by RKO's answers that as to the Skirball theatres, 11 pictures were licensed during that same season, first-run to the Barry theatre, which was an independent. You have shown that fact on your chart, Exhibit 428, have you? A. That is right.
(3162)

Q. And as I understood your testimony, your reason for excluding those is because you did not consider the theatre a regular first-run theatre? A. That is correct.

Q. And by regular, you meant that it did not take clearance over other theatres? A. Not only that, but it did not play—in other words, it did not get the regular splits of either, as I said, one to three, or fifty-fifty, but played what it could get.

Q. Now on this very theatre that we are talking about in Pittsburgh, your records show that that very theatre, the

Peter M. Borwick—By Plaintiff—Preliminary Cross

Barry, took clearance over all other theatres in the city of 21 days on RKO pictures? A. You say the Barry theatre?

Q. Yes. A. Well, I do not have a record of it.

Q. Well, if you will just look at our interrogatories you will see that, sir. But without taking time to do that at this time, if that is true that in that case there was one theatre that was sold regularly that is classified as a first-run, your chart here does not reflect that, isn't that so? A. That is right,

Q. The record will speak for itself as to what I am saying as to whether it is true or not. Your chart does not reflect that as to the Barry theatre. A. This chart does not reflect the pictures sold to the Barry theatre.

Q. Now as I understood you in discussing the question (3163)

with Judge Proskauer this morning as to Buffalo, you said that you excluded the Twentieth Century theatre, is that right? A. Yes, I think I did.

Q. And you gave the same reasons I believe then—so we won't bring Mr. Wright to his feet—you gave the same reasons on cross-examination then that you gave on direct as to why you excluded it? A. I don't remember at the moment what the reason was.

Q. Well, you did exclude those? A. Yes, I did exclude those.

Q. And you did not consider it a regular first-run, and that is why you excluded it? A. That is right.

Q. Now the record in this case shows that RKO sells all of its first-run to that theatre. Would you feel that a theatre could be first-run for RKO and not first-run for Warner Bros? A. Would you repeat that, please?

Mr. Leisure: Will you please read it?

Q. (Question read.) A. Well, the only way I can answer that is simply this, that if it played discarded pictures or

Peter M. Borwick—By Plaintiff—Preliminary Cross

small numbers of pictures of both of them, of course it would not be considered a first-run. Or if it played discarded pictures of RKO and did not play any pictures at all of Warner, why it still would not be a first-run.

Q. You say "if" now, Lieutenant. But the record shows (3164)

that during the 1943-44 season, RKO Radio Pictures licensed 38 of its first-run pictures to the Twentieth Century, so there is no room for an "if" there, is there. It also played Princess O'Rourke. A. (No answer.)

Q. I don't want to spend any further time on it; I just want the record to be straight. A. Just a moment. I want to make sure that there is not an error here.

Q. Go right ahead. A. We show, of course, you played all your product independent in Buffalo.

Q. Does it show on the chart? A. It sure does. Are you talking about Buffalo, New York? Is that right?

Q. That is right. The point of my question was, and I was curious to know, how a theatre could be first-run for RKO and not be first-run for Warner Bros. That was the point of my examination about Buffalo. A. Yes. Well, let me say this, that the independent is already included in the distribution of product under RKO, so that the independent is already given credit for any product that it plays.

Q. That is true, but it is not shown as to Warner? A. That is right, it was not shown as to Warner,

Q. Yet it was the same theatre, and yet you excluded it as to Warner and did not exclude it as to us? A. As I say, it is already accounted for.

(3165)

Q. Did you have any other reason for excluding these theatres under 6 and the 11, such as the very theatre, other than the reasons you have given us for making up this total, Lieutenant Borwick? A. I don't recall of any.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. Now, you notice on your summaries, you have on your summaries—take RKO for instance—that we sold only 23 independents, and that we sold to 63 affiliated theatres. If those factors that I have been bringing out here show that we sold to 28 independents first-run, that would change your total so that the relationship instead of being 63 to 23 would be 35 to 20-some-odd; that would have changed your chart considerably, wouldn't it? A. On that assumption, yes.

Q. On the record? A. Well, not considerably. I beg your pardon. You said five changes would be involved. I would not say that is considerable.

Q. I said if there were 28, as I am suggesting to you, the record shows. A. That would be an increase of five which on the basis of a total of 92 cities would not be a considerable increase.

Mr. Leisure: If your Honors please, I object to this chart. I ordinarily certainly would not object to the chart, but this is not based on the record. The witness has taken the figures that are in the record

(3166)

and then arbitrarily outside of the record he has determined what he chooses to call regular first-run; so that there is something in the record here put in by this chart which is not borne out by the record. Now, if Mr. Wright had wanted to make this point it seems to me it was the burden upon him in his direct case to prove and show what he considered to be a regular first-run theatre as being a regular first-run theatre. Then this kind of a chart might be valuable. But as it is now, it seems to me it is grossly misleading to the Court, and I object to it not only because it is misleading but because it goes out of the record to prove what it tries to prove. Namely, as to RKO here, anyone reading this would think that we had sold to 63 affiliated theatres and to only 23 independents, whereas the record already shows that it

Colloquy

should be a relationship of 35-affiliated and 20-some-odd independents, which is very close, and which we know to be a fact, and that is what it should be, and this chart does not show that, and it can only arrive at that conclusion by going outside the record, assuming for his own purposes that something is not a regular first-run theatre. And I have already shown that with respect to Buffalo he regarded it as a first-run theatre, because we sold all our first-run product there, but it was not a first-run theatre for Warner.

(3167)

So I think the chart is very much misleading, and I object to it.

Judge Hand: I think it is certainly confusing. At most this sort of thing is argumentative. It is not testimony at all. But we will admit it.

Mr. Wright: If the Court please, I can re-examine him on some of these situations which Mr. Davis covered, for example, and which Mr. Davis was in error about and the witness was right. I can call attention to other corrections of that nature, and it seems to me that it is futile to go through the process on the stand of covering the arguments of the parties with respect to the exhibit. We have made clear I think exactly what was done in this connection, and the exhibit does not purport to be anything more than a statement of our contentions as to what this underlying data that is referred to in the exhibit shows; and as such I think that it should be clearly received.

Now, if your Honor wishes me to spend more time with the witness on these discrepancies that have been developed, I will do it.

Judge Hand: I said we will admit it.

Mr. Wright: I am sorry, I did not get the Court's ruling.

Colloquy

(Government's Exhibit 428 for identification received in evidence.)

(3168)

Mr. Wright: Would you mark these exhibits 429, 430 and 431 respectively.

(Marked Government's Exhibits 429, 430 and 431 for identification.)

Judge Hand: What are these, more towns?

Mr. Wright: This is the same data for the same towns for three prior seasons which are covered by these same admissions of fact.

Mr. Proskauer: Mr. Wright, would you save time and concede that these that you are now offering are subject to the same infirmities developed in cross-examination as the ones received in evidence?

Mr. Wright: Precisely.

There is just one question I want to ask him: I think there was a different method used as to one or two seasons and I want to have him explain that to the Court.

Mr. Seymour: I would like to ask a question about the next chart before it is received.

Mr. Proskauer: Could I have an answer to my question? It might silence me if I got an affirmative answer.

Mr. Wright: What is your question?

Mr. Proskauer: Will you concede that these that you are now offering are subject to the same infirmi-

(3169)

ties developed on the cross-examination of the witness as to the last one?

Mr. Wright: I answered you with a firm yes once, and I will do it again.

Peter M. Borwick—By Plaintiff—Direct

Mr. Proskauer: It was not firm enough for me to hear it.

Mr. Wright: These are similar tabulations to 428 based upon the admissions of fact filed by the eight respective defendants. 429 covers the 1941-42 season; 430, the 1939-40 season; and 431, the 1936-37 season.

Mr. Seymour: I should like to ask a few additional questions about these. I will just be a moment.

Mr. Wright: Well, may I ask him some, direct questions first?

Mr. Seymour: Surely.

Direct Examination resumed by Mr. Wright:

Q. Calling your attention to the Paramount column in the exhibits marked for identification as 430 and 431, those were seasons, were they not, prior to the consent decree method of selling in small blocks, is that right? I am calling your attention to 430 and 431, the 1939-40 and 1936-37 seasons. A. Yes, sir.

Q. Those were seasons which were prior to the consent decree method of selling in small blocks, is that correct? (3170)

A. That is correct.

Q. During those seasons did you notice that in the answers furnished by Paramount they sometimes showed more features as receiving a first-run exhibition in a town than they actually released during that season? A. That is correct, sir.

Q. In those cases did you ascertain what the explanation of that was? A. Yes.

Q. And the explanation was, was it not, that they had—after the one exhibitor had bought the entire group for the season, certain features were rejected by him for first-run and then sold to another exhibitor, is that right? A. That is correct, sir.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. In those situations, regardless of whether an exhibitor played six or more, you did not include in your tabulation the exhibitor playing the rejected features, is that right? A. That's right.

Q. Otherwise the method you have pursued was the same as that that you have already described with reference to Exhibit 428? A. Exactly the same, sir.

Preliminary Cross Examination by Mr. Seymour:

Q. As I understand it, on these other charts that have just been received, you continued the process of excluding from the column any independent exhibitors who played six or less pictures, is that right? A. That is correct.
(3171)

Q. And that runs through all the columns in all these other charts? A. That is right.

Q. Did you also, referring to the chart for the 1941-42 period, exclude from the Paramount column some independent exhibitors who played more than six Paramount feature pictures during that season? A. Well, if I did, it was done inadvertently.

Q. Weren't there more than six Paramount feature pictures licensed to independent exhibitors in Camden during that season? A. Talking about the 1941-42 season?

Q. That's right. A. I notice here that you have got a note, "Information in regard to five features which are unaccounted for will be forthcoming shortly." I don't remember offhand whether we got that information or not. If we did not get the information, of course, it would be excluded. If we did, we will make the proper corrections.

Q. I ask you the same questions about Pittsburgh, Spokane, Fort Worth and Norfolk, were there any independent exhibitors who licensed more than six pictures in that season from Paramount which are not included? A. To save time, I will say the same thing, that it would not—if it was

Peter M. Borwick—By Plaintiff—Preliminary Cross

omitted, it was omitted inadvertently and will be corrected
(3172)

accordingly.

Q. Referring to, let me ask you about, Kansas City, Missouri, there you have included RKO although the admissions of fact indicate that, I think, seven features were licensed, but you made no reference to an independent which licensed eight features. Is your answer the same as to that?

A. Yes, very definitely.

Q. Referring to the 1939-40 season, would you look at Denver? A. 1939-40?

Q. Yes. That shows that Paramount pictures were licensed to Fox, does it not? A. 1939-40?

Q. Yes. A. Yes, it does.

Q. Isn't it the fact that the admissions show approximately six licensed to Fox and approximately 55 licensed to an independent? A. If it does, as I say, if it does, that can also be corrected.

Q. And that would be an inadvertent omission? A. Yes, sir.

Q. And I ask you the same questions as to the 1939-40 seasons as to Atlanta, Camden, Chicago, Fort Worth, Oakland, Paterson, Rochester, San Francisco, Scranton, Utica, Wilmington, Wichita and Norfolk, I ask you whether in the admissions of fact it does not appear that more than six features were licensed to independents in those cities in that year? A. As I say, I cannot tell you, again, without consulting the—

(3173)

ing the—

Mr. Wright: If the Court please, he has already testified that as to those prior years, 1936-37 and 1939-40, where they appeared to be rejected, that is, the features, he excluded the exhibitor playing them no matter how many there were.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. How could you tell from the admissions of fact that they were rejected features? A. Well, if you license 60 pictures during the season, that is, if you produced or distributed 60 pictures during the season and you distributed 70, of course, 10 must be rejected, so that the total number of exclusions would have to be 16, isn't that correct?

Q. So that, of course, applies to Denver where Fox licensed approximately six and an independent licensed 55, that is the reason you included Fox and not the independent?

A. As I say, if there is—if in that total is included more pictures than you distributed during the season, therefore the basis for a rejection would have to be 16 and not 6.

Q. What you did was, where you found more than 60 you always excluded a reference to the independent, is that right?

A. No, I can't say that.

Q. But generally where there was any question of doubt as to whether you ought to mention the independent, you excluded the independent? A. No, that is not so.

Q. I can give you some more cities in that 1939-40 season. I have already mentioned a long list. Didn't you also exclude Birmingham, Kansas City, Missouri, Long Beach, Pittsburgh, Portland and Spokane, where more than six features were licensed to independents and you make no reference to it? A. I said the same statement I made before applied to these cities.

Q. Your observations as to New York, N. Y., would be the same as they were on the 1943-44 chart as to all of these, is that so, that the reference is actually to Manhattan? A. Well, it would be true if that was the policy at that time.

(3175)

Q. Dealing with the 1936-37 season, isn't it the fact that the admissions of fact show license of more than six features to independents in the following cities which you have not referred to on the chart for that year? A. Well, again—

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. (Continuing) Atlanta, Birmingham, Cleveland, Fort Worth, Kansas City, Missouri— A. Let me—

Q. (Continuing) Long Beach, Oakland, Omaha, San Francisco, Spokane and Wilmington, Delaware? A. Let me say this, that the original information that Paramount submitted to us was not complete and any errors that may crop up can be partly—can partly be accounted for by the lack of complete information, and as such information is completed, corrections will be properly made.

Q. But where you got information in the admissions showing the licensing of more than six features to independents, that was not incomplete information, was it? A. No, it was not.

Q. And your reason for excluding it, if the information contained that information, was simply that you decided not to include it, is that it? A. No.

Q. It was an inadvertent omission? A. It was an inadvertent omission in the calculation.

Q. And that might have happened in all those cities I mentioned? A. It might have happened. I cannot say that (3176) it has.

By Mr. Wright:

Q. Lieutenant Borwick, in connection with those—

Mr. Caskey: Just a minute. Are you finished?

Mr. Wright: I want to ask him just one.

Q. (Continuing) —in connection with those two seasons on Paramount, 1936-37, 1939-40, it is a fact, is it not, that as to those seasons you excluded exhibitors playing those pictures which appeared to have been rejected regardless of whether or not they were affiliated or independent, or regardless of how many features they played, is that right? A. That is correct.

Peter M. Borwick—By Plaintiff—Preliminary Cross

By Mr. Caskey:

Q. Look at 1936-37 under Denver. You show Fox pictures licensed to Fox. Where did you get that information?

The Witness: Would you kindly repeat your question, Mr. Caskey?

(Question read.)

A. The list we have here shows Fox have an interest in those theatres.

Q. As of what date is that theatre list? A. I don't know offhand.

Q. Look at the front of it. A. August 1, 1945.

Q. What other basis have you got for saying that it was (3177)

Fox theatres? A. Well, we used answers given to interrogatory 50—1939—as the basis of determining the theatre affiliation of any particular defendant.

Q. Doesn't it appear right on the face of the answer to the interrogatory, which I am showing to the Court, that that was an independently operated theatre in 1936, and doesn't the changeover to Fox stand out perfectly plain? Just look at the whole answer for the four years. They are all on one sheet of paper, aren't they? Look at Exhibit 44. That is the answer to the interrogatory. A. Well, I cannot say who had a financial interest but what you have got here, General Theatres. I would have to search back—

Q. What evidence is there in the record that you or Mr. Wright or anybody else can produce that Fox had any interest in any theatre in Denver in 1936? A. Well, this Exhibit No. 12 shows—supplied by defendant Fox—shows this Aladdin Theatre, Broadway Theatre, Denver Theatre. Now, I do not know who the other theatre is, but I do not find it here, but you show, on this answer here, you show the Aladdin, you show the Broadway; you show the Denver.

Peter M. Borwick—By Plaintiff—Preliminary Cross.

Q. As of what date is that? A. Well, this was submitted sometime in 1939 or 1940.

Q. Yes, sir. It does not purport to be as of 1936, does it?

A. No, this does not, I imagine.

(3178)

Q. What other evidence have you got to justify your statement in this chart? A. Whether.—

Q. What evidence. A. (Continuing) —there is evidence we may have had in the files that may not have been introduced in evidence, I don't know.

Q. Your counsel has stated this is a compilation of what is in evidence. What did you yourself personally look at that led you to classify those theatres as Fox? A. On theatre lists supplied to us by defendants plus answers to interrogatories of that character, particularly this 50, plus any other information that we had in the Department of Justice files pertaining to that.

Q. Will you produce it, anything that you have got, that is not in evidence? A. If it is available, I shall produce it.

Mr. Caskey: Mr. Wright, have you any evidence that you want to produce to justify this statement?

Mr. Wright: If the Court please, I do not know at this moment when the Fox Company acquired the first-run theatres in Denver from Hoffman, who I believe was the former operator there, and is now a Fox partner. As far as we are concerned it is of no importance; if Mr. Caskey will give us a date on it, we will accept that date as the fact.

Mr. Caskey: My point is that we answered the

(3179)

interrogatories, and on the face, there was no justification for this. This purports to be a summary of evidence, and I submit there is no evidence in the record that justifies that statement.

Colloquy

Mr. Wright: If there isn't, the statement goes out, there is no question about that. I said, just name the date when Fox acquired the Denver first-runs and we will accept it.

Mr. Caskey: I will find the date, but I submit the exhibit ought not to be received because there is no justification for this one.

Judge Hand: I do not think myself it is a very good answer to say, whenever they find mistakes here, name the date and we will concede it. I realize that this is a complicated thing with lots of facts and you cannot be a perfectionist. Probably it is subject to scrutiny.

Mr. Seymour: If your Honor please, what I am troubled by is this, when a thing like this, which is full of mistakes, is received, it becomes a jumping off place, it appears in the Government's brief as gospel because it was received, although it is proved to be heresay in the cross-examination, and then to remind your Honors, and to make the corrections, we have to go through this whole process again. Having shown that it is inaccurate and that it is not in accordance with the evidence, it burdens your Honors and us to

(3180)

have it received and then be the springboard for other contentions. It is wrong, all these four charts have been proved to be wrong in many respects, but they will crop up again, uncorrected, if they are received in evidence, and I do not think these three should be received, and I think the other one ought to be stricken.

Mr. Caskey: The whole purpose, at this late date, just at the close of the case, of putting these in, as I was given to understand, as told by Mr. Wright, was so that we would have something which could be used

Colloquy

for the convenience of Court and counsel, which would be a fair summary of the evidence. These are not a fair summary of the evidence. They are, at most, a statement of contentions. In some instances we have shown them completely wrong, and they will simply, if received, as Mr. Seymour says, force upon us the burden, which is distasteful and distasteful to the Court of criticising and explaining and of attempting to set up another chart. We shouldn't have that burden. The person who prepared it should have that burden.

Mr. Wright: If the Court please, I submit that these charts are *prima facie* correct. There isn't any question that where you are dealing with 92 cities and exhibitors' contracts with first-run exhibitors with eight in each one, you have about 700-odd situations on each chart, and in no way I know of is it possible to avoid any errors creeping into the chart.

(3181)

Judge Hand: In many cases this witness has not only said he did not know, but in some cases you have conceded they were wrong, a mistake to be corrected, and it is a pretty sloppy kind of exhibit to put in as a tabulation.

Mr. Wright: If the court please, the data was checked as carefully as we were able to check it. The reason for these arbitrary adjustments that we had to make in the first instance was simply because the defendants declined to give us what the other three defendants gave us, that was a straightforward statement of who their first-run accounts were in these cities. Instead of giving us that, they listed all the pictures that played their pictures—the theatres playing them, regardless of whether they were neigh-

Colloquy

borhood, subsequent-runs, rejected pictures or anything else. I admit that has made a complex situation. We have dealt with it—

Judge Hand: Didn't they ever give you their first-runs?

Mr. Wright They gave us, as to these seasons, these statements, which simply said, in such and such and town the following number of pictures were exhibited first-run in such and such an exhibitor's theatre.

Judge Hand: What did they hold back from you, if they did hold anything back from you? Why haven't you got it long before this?

(3182)

Mr. Wright: This was a matter where we proceeded in this way: We originally served admissions with respect to some—notices to admit—with respect to some of these cities set forth, asking them to admit what the first-run theatres were in the town and what theatres were their regular first-run outlets, that is, during the seasons in question. Then they said, "Well, you don't need to serve any more notices. We will give you that data and for all the cities in the form of these statements," and when we got the statements they weren't the form of the statement as to what the first-run theatres were in the town. They refused to make any statement or concession as to what was or was not a first-run theatre in any town. They would not make any statement or concession as to who the first-run account, the regular first-run account, was in the town, but insisted on giving us only the statement as to who played the various number of pictures first-run in these towns. We took that data and we made this analysis of it, took it as they gave it to us, and I repeat, there is nothing in any of these

Colloquy

charts that is intended to contradict any of that underlying evidence on which it is based. We did feel bound to tabulate in this manner rather than putting the Court to the burden of examining all of the exhibits that are reflected here for the purpose of determining the respective merits of the parties' con-

(3183)

tions.

Judge Hand: You know what has been done in these various theatres, and how would you classify them if you did know them?

Mr. Wright: The record should, I say, that the record——

Judge Hand: Don't tell me what "should."

Mr. Wright: I say that the record——

Judge Hand: You have had an opportunity here to examine these people very fully, according to my notion, and I am not going to admit a lot of stuff that was merely a vague classification based on nothing you found.

Mr. Wright: I submit, if the Court please, that the record as it now exists, the underlying evidence itself, does permit accurate determination or sufficiently——

Judge Hand: Then don't interlard your remarks with statements that you could not get what you wanted and all that sort of thing. I really don't understand your argument, so I am not—and your defense of this exhibit, so I am not in a very good position.

Mr. Proskauer: I think I can clear this issue. He asked us, "What are your first-run theatres?" And we say, "We give you a list of every theatre in every city where we exhibit first-run." He has got in his mind some kind of an a priori subjective classification of what is called by him a regular first-run theatre.

Colloquy

(3184)

As I understand it, under that classification, the Music Hall in New York would not be a first-run theatre, because nobody uses it customarily, and he approximates everything, and he has throughout this trial, to the ridiculous norm that if we exhibit first-run, as we did in Buffalo, even with our guinea pig picture, not the refuse of our pictures; but the best picture we had, in a first-run theatre, where we sell six pictures, in his mind you exclude that because that is not what he calls a regular first-run, and all this difficulty comes from that obsession, subjective in the mind of the distinguished Assistant Attorney General. We have given him the facts and his criticism is that we do not adjust the facts to this a priori preconception of his about what he calls regular first-run accounts. I want to suggest to your Honor—

Judge Hand: He suggested that you have not given him the facts so that he could not get up any better exhibit than he has got.

Mr. Proskauer: They cannot get them—

Judge Hand: Wait just a minute. And he has followed that by a statement that his exhibit, with the exception of a few mistakes, which I should expect in a complicated situation like this is all right, that it is a proper classification. Those remarks seem to me

(3185)

wholly inconsistent.

Mr. Proskauer: They are not only inconsistent but they demonstrate why Mr. Seymour's objection and motion to strike the last exhibit should be granted. It does no harm to Mr. Wright to make that ruling, because he is still free to argue on his brief anything that is in this record. The vice that we see in this is that, instead of arguing what is in the record, we are going to

Monologue

have to argue that an exhibit you have put in, or admitted, is not in the record and we are going to have to start from there and work backwards. It is no harm to Mr. Wright to exclude these exhibits, if this evidence is in the record.

Mr. Davis: May I say something?

Judge Hand: Of course, it is quite indifferent to us what tabulations in the way of exhibits we receive as long as there aren't too many, but it is vital that we should know what they mean and that they should show on their face what they mean as a reflection of the evidence without too much outside correction and examination.

Mr. Davis: I am a little bit sensitive, your Honor, about my client. When Mr. Wright says that "They haven't given" him evidence, I suppose he means that "they" to be an all-inclusive pronoun and that we are within it. We have answered every interrogatory that was put to us. And on this question of what our first-run theatres are, your Honors remember that some

(3186)

thing like four weeks ago, the first witness who began the defendant's case, was introduced by my clients and gave a list of the theatres which he considered first-run, which was tendered and accepted subject to check, and on the 5th day of November last, two weeks ago, that list was formally and finally received in evidence. We have nothing more we can contribute on that subject.

Mr. Caskey: If your Honors please, my objection is just that this is plain unsupported by the record. We have shown to your Honors what we have answered: There was no holding back. We said Twentieth Century licensed to General Theatres, Inc., R. E. Hoffman, its pictures for exhibition by Aladdin, Broadway,

Colloquy

Rialto, Tabor and Denver Theatres first-run. There can't be any clearer statement than that, and the plaintiff, without any record, anything in the record, has said that that was a Fox theatre.

(3187)

Mr. Raftery: Your Honors, aren't we back now to the point where we were this morning before we started? Judge Hand just commented about the charts, provided there are not too many. I think there are thirty more that are contemplated. Now gradually we are getting around to an argument between the witness who prepared his idea of what evidence is in and what counsel said—

Judge Hand: That is all right, we are perfectly satisfied to have that kind of thing go on; it goes on in every lawsuit where there are tabulating experts, and it is more aggravated and aggravating in a complex suit like this. What I do want to have in here is something we want to be satisfied is not merely confusing to us. I do not care what tabulations he puts in.

Mr. Raftery: If your Honors please, the only suggestion I wanted to make—I do not know whether this would be agreeable to the rest—let the witness, instead of offering this bundle of charts, put them together, give them to us, just as he would an index or an appendix to a trial brief, and we will answer him as best we can from what is in, instead of burdening the Court with what he says is in and which everybody else says is not in, and stop the eternal argument. That is the only point I make. It is not evidence, it is argument.

(3188)

Judge Hand: It certainly is not evidence, that is true; but wouldn't some of your own testimony be subject to the same objection?

Colloquy

Mr. Raftery: I did not offer a chart, not one.

Mr. Proskauer: The answer, your Honor, is no, because we put in evidence no chart which was even questioned as to its accuracy in correspondence with the record. Of course it is proper to put in tabulations and charts of evidence. What is improper is to put in tabulations and charts of things which are not evidence.

Mr. Wright: May I say this, if the Court please. The primary purpose in offering this is to aid the Court. Now admittedly this is argumentative in form. I am simply trying by this method to narrow the area of argument.

Now, without offering these charts, and simply starting with the basic material, we would set this up in a trial brief and argue it, or in a final brief, and they would make an argument in their brief disputing it. Now the range of that would be enormous, if in the first instance we just argued about the admissions of fact, the theatrical lists, the pooling agreements, and the other data that is reflected here.

Now in order to narrow the scope of that argument we offer these tabulations as prima facie evidence of these facts, with a description of how they were derived, and what we did; and then it seems to me they direct their fire at this chart, and you come

(3189)

out with an accurate appraisal, a more accurate appraisal ultimately of what is in this record than the Court ever would if it simply tried to reconcile the different points of view without the tabulations.

Judge Hand: I have no doubt of that if those charts were not too vulnerable. In other words, if they really show what you are doing.

Colloquy

Mr. Proskauer: Your Honor, there would not be any objection to what Mr. Wright says if it were not for the fact that we have not only challenged him successfully to show that these charts are in accordance with the evidence, but we have affirmatively shown that they misstate the evidence. Now, how is it of illumination to the Court to admit complicated charts like these as—

Judge Hand: It certainly is not if what you say is accurate, and goes in deep enough to his charts. That is where I have difficulty. I do not think they are very satisfactory as presented because when we look at certain things and certain situations we certainly do not know without reading 25 or 30 or a hundred pages of testimony what the thing covers.

Mr. Proskauer: He can make these charts accurate and use them in a brief and not give us this sort of stuff.

(3190) Mr. Rattery: Mr. Wright just said in effect he is putting a jurat on the trial brief and having the witness swear to the truth of a trial brief. Now I submit that in the interest of economy of time, we will take his trial brief unsworn to and reply on what is in evidence.

Judge Hand: If we could not make out a basis for what he is saying in his trial brief, a similar chart in his trial brief would not do any good.

Mr. Proskauer: That is why it does not have the dignity of an exhibit.

Judge Hand: The thing may be in doubt, but we want to get some kind of a head-on issue here and understand when certain statements are made what the contentions are.

Colloquy

Mr. Davis: Here is what it comes down to, your Honor: when this case comes on to be briefed, presumably Mr. Wright in his brief will make certain statements of fact, and he will refer to something to support them. If these exhibits are accepted he will in brackets in his brief say "See Exhibit 440" or whatever it is. If they are not accepted, he will have to refer your Honors to the original sources of evidence that the record contains.

Now there is no reason why a fallacious exhibit should go in to short-cut the burden of counsel in searching for the testimony on which the exhibit rests. If the exhibit's accuracy as a summary is admitted, it is a very great convenience to the Court, to the plain-

(3191)

tiff, to the defendants, to be able to refer to that summary; but if the integrity of the summary is under serious—and in this case, as we think, entirely successful—attack, it ought not to be the subject of citation in any future brief or argument.

Mr. Wright: If the Court please, the attack that has been made has been limited to certain specific situations appearing in the chart, and I submit that from the Court's standpoint it is of value to the Court to have this chart so that the attack, if well founded, may then be channeled to those specific situations, and you will have before you a comprehensive statement of what is shown or claimed to be shown by a great mass of underlying data.

Now, in the absence of any tabulation of this kind, we simply started at the point where, in order to make any statement, we have to say "See Exhibit So-and-so, so-and-so, and so-and-so," reeling off perhaps forty or fifty of them, and the Court has to do—

Judge Hand: Shouldn't you make a better summary of this?

Colloquy

Mr. Proskauer: It is perfectly simple to cut this Gordian knot. Let him make a decent and fair summary and we will agree to them.

Judge Hand: You can't expect him to make a summary according to your contentions, of course.

(3192)

Mr. Proskauer: I don't want that. Just what is in evidence.

Judge Hand: All we want is a summary based on his own contentions which points in that direction clearly so that we will know how he reaches these. I do not think we have that.

Mr. Wright: Let me see if I can make it clear: as to United Artists, Universal and Columbia, there is, of course, no question as to the method of tabulation used there. They furnished us with a list purporting to show their first-run accounts in the towns in question during those seasons. We just made a direct transcription of those cases.

Now as to the other defendants, the problem arose this way: they did not just name the first-run account in the city for the season. They gave us a list of theatres which played any of their films on a first-run in the town, with the number of films played.

Now the reasons why we had to make an arbitrary analysis of that material are these. It is an established fact from the testimony of witnesses here, that all of the features that these defendants released during any particular season are not sufficiently attractive at the box office to justify a first-run in what is known as a regular first-run theatre. Some of those in consequence, every year are rejected, and find their way

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for initial exhibition in some later run theatres that are not generally regarded as first-run theatres in the trade.

Colloquy

Judge Hand: And you would call such a theatre second-run where though it is playing a picture first-run, it is a run in a theatre which you do not consider a first-run theatre?

Mr. Wright: Yes. In almost all instances we agree with Mr. Rodgers' tabulation as to what is a first-run theatre. There are in the entire list I would say two or three differences.

Judge Hand: How much would it affect you if you took their form of tabulation?

Mr. Wright: If we took what form, if the Court please?

Judge Hand: Their form of classification.

Mr. Caskey: If the Court please—

Judge Hand: Wait a minute, one at a time.

Mr. Wright: We did, as I understand, check—I asked to have it done; I assume it was done—check these 1943-44 lists against Mr. Rodgers' list of first-run theatres. Of course as to the prior season, Mr. Rodgers' list, covering a substantially later date, would not be of much assistance, and I think as to 1943-44 on either basis the differences between a tabulation using the methods we pursued, and a tabulation

(3194)

simply checking against his list would reveal very few differences, that the amount would not be significant? Now—

Judge Hand: Where is it significant? (No response.) Can't you hear me?

Mr. Wright: What?

Judge Hand: Where is it significant? In what years is it significant?

Mr. Wright: I say that his tabulation has no value for the other years because he put in a list of first-run theatres, a current list, which is close to the 1943-

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44 season. But when you got back into 1941-42, 1939-40, and 1936-37, there would be different theatres operating as first-run theatres in the town than those shown on his list. Now we did use his list as to 1943-44, where it had value.—

Judge Hand: I do not see why you could not use it in other years. I make nothing out of your statement.

Mr. Wright: If we did that, the defendants would claim, I suppose, that Mr. Rodgers' list had no relevancy in the prior years. Now in order to guard ourselves against that claim, we simply used the figures which they supplied for those years and made an arbitrary adjustment which we think gives a correct picture of the actual distribution of these films in the so-called first-run outlets in these cities which are accustomed to show the first class pictures of one or more defendants on a first-run.

(3195)

Mr. Proskauer: Your Honor, Mr. Wright has suggested that these theatres that we listed playing first-run were playing the refuse, the rejects. That just is shown by the record to be a false alibi. Here, in our own case, this theatre up in Buffalo that he threw out of his tabulation because we sold him only six pictures was shown to have played Princess O'Rourke, which he took as our picture having the biggest return of any picture of the year, and we played that picture in that Buffalo theatre, which he says is not a first-run theatre, but it is a theatre which plays the entire output of RKO.

Judge Hand: You played it first-run, I suppose?

Mr. Proskauer: I beg your pardon, sir?

Judge Hand: I suppose you played it first-run up there?

Colloquy

Mr. Proskauer: Certainly, in that independent theatre.

Mr. Caskey: Your Honor, I should like to call your attention to one thing that is even more fundamental. When you take the 1941-42 chart, the town of Elizabeth is the fourth down at the bottom. Now, in Elizabeth, as this record clearly shows, there is the Liberty Theatre, operated by Skouras Theatres Corporation, in which, as you know, RKO has an indirect 15 per cent interest; and the Ritz and the Regent, operated by Warner Bros.; and to use Mr. Wright's words, those

(3196)

three theatres are pooled. Now, those are the only three first-run theatres in Elizabeth, and they exhibit the pictures of these eight defendants.

Now, let me read how the plaintiff describes those theatres: He says that Warner's licenses Warner. He says Fox licenses RKO and Warner; Paramount licenses Warner; Loew's licenses Warner; RKO licenses Warner and RKO; United Artists licenses Skouras; Universal licenses Warner.

Now, I submit that this Court, picking that chart up, would not know that the same three theatres were involved in each producer's product.

Mr. Wright: If the Court please, I think perhaps I can make this clear if I explained the ultimate use we would propose to make of these charts: For example, we would expect to show and argue in the brief from these the number of cities in which all the first-run outlets were affiliated. That is, according to my tabulation of the 92, 39. Now, for the purposes of that tabulation what Mr. Caskey is talking about would not make the slightest bit of difference. All of the outlets under his view, or our view, are affiliated. Again, we would make tabulations showing, on this

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(3197) question of where all the first-run outlets are affiliated,

according to our figures, 39 of those, and 4 were all of the first-run outlets unaffiliated. On another tabulation we show that in 12 of the towns the independents got only one major distributor's product, and in none were there any towns where the affiliated exhibitor got only one major product.

Now, those are the ultimate facts which we would argue in the brief, and we are laying a foundation for that here. Much of this quibbling over individual distributions and individual situations simply would not damage or affect those ultimate conclusions we would ask the Court to draw from the material in any event. That is why I think the Court has been misled here by some of this examination of situations that have been made into supposing—

Judge Hand: You could certainly improve these exhibits and make them conform more to the evidence if you went at it, I should think. I do not see but what they are all vulnerable, except 1943-44. Apparently they are not.

Mr. Wright: We had an additional check on 1943-44 in the light of that first-run theatre list. But as to the others, I submit, if the Court please, the extent to which they are vulnerable is easily ascertainable by a comparison of what is on the tabulation offered

(3198) here and the underlying exhibits, and it is simple enough for them to actually point out the extent and degree of any errors that may appear.

Judge Hand: It is really your job to get them right when you put them in. It is not an exercise for us at all to be comparing any more things than we have to compare.

Colloquy

Mr. Wright: I am merely suggesting that this is a more agreeable exercise for the Court than would be the exercise required to simply start from scratch without those, let us say, intervening work sheets, and then attempt to determine——

Judge Hand: That may be, but that is no answer to your failure to put in correct exhibits.

Judge Bright: Wouldn't we have to start from scratch wherever there is a challenge?

Mr. Wright: This simply narrows the area of challenge, as I see it. I submit, if the Court please, that the number of instances in which there are errors here, when considered in the light of the number of situations covered, and the ultimate use to which we propose to put them, will appear to be insignificant.

Now, that——

Judge Hand: Maybe so. We do not know whether they are or they are not.

(3199)

Mr. Proskauer: Don't forget, if your Honors please, that our cross-examination was impromptu. I do not know how many other things I could have developed.

Mr. Leisure: If your Honors please, the problem I have, as far as RKO is concerned on this 1943-44 one which we have referred to, is that there are 28 separate cities which are not correct, according to the record. Now, that changes the total down here at the bottom which, as I pointed out in the cross-examination of the witness, instead of our having sold to 63 affiliated theatres and only 23 independents, when corrected—and we will have to call a witness on rebuttal; and we should not be put to that burden merely because an improper exhibit is put in—when corrected the exhibit would show that we sold 35

Colloquy

affiliates and some 20 independents, which is what the record should be. Now, I submit we should not be put to that burden of calling rebuttal witnesses merely to correct Mr. Wright's exhibits.

Mr. Wright: Mr. Leisure does not need to call any rebuttal witness. All he has to do is to point out what the underlying exhibit says that is in conflict with what the testimony about the exhibit was; and I do not think he can do it in those situations.

Judge Hand: Wait a minute. He has not got the burden of correcting these.

(3200)

Mr. Wright: Let me say this: As to 429, 430 and 413, those are offered by us for the assistance of the Court. If the Court does not want to take them and does not feel it will be beneficial in narrowing down and disposing of the ultimate issues, I shall withdraw them. The effort here has been to assist the Court.

The Court: I think you had better.

Mr. Raftery: What are the numbers?

Mr. Wright: The one I intended to have remain was 428, the one in evidence. The ones I am withdrawing are 429, 430 and 431.

Mr. Davis: 428 was the one where the firing started, and it was fired at just as heartily as any of the others. Then it was agreed by stipulation that the others, later offered, were subject to the same infirmities.

Judge Hand: Mr. Leisure particularly is weeping freely over this Exhibit 428 and says that it is very misleading with respect to his client. Now, I should think you could correct it.

Mr. Wright: I would say it is there for examination; he can cross-examine on any one of those errors that he says exists. I say that it is substantially cor-

Colloquy

rect in its present form, as testified to by the witness—

Judge Goddard: I think it is confusing.

(3201)

Mr. Proskauer: Why doesn't the tail go with the hide? That is a legal principle as old as any of us. You conceded that the others have the same infirmity. This is just as bad as the ones—

Mr. Wright: I have conceded no infirmity. As a matter of fact, Mr. Davis cross-examined him and brought out two statements in two situations which are wholly incorrect. If we want to have a redirect examination on them I can show that fact. I just do not see the point in taking up the time of the Court.

Judge Hand: How about Mr. Leisure's objection?

Mr. Wright: Mr. Leisure's objection is in vague general terms. As to the one situation in Pittsburgh which was specific, I covered that on his direct testimony. It is particularly clear as to what the difference between us was. Now, when he says there are ten other situations that are wrong, I simply say there are not, and if there are—

Mr. Caskey: What about Richmond where you would not concede it was wrong?

Mr. Proskauer: What about Buffalo, a first-run theatre, where our guinea pig picture was shown?

Mr. Seymour: What about—

Judge Hand: I think you had better get this right.

(3202)

Judge Goddard: I could not rely on that.

Mr. Wright: If your Honors simply accept the statement of counsel that they are incorrect as against mine that I think it is substantially correct, there is nothing more that I can do.

Judge Hand: What about Mr. Leisure's objection?

Colloquy

Mr. Wright: As I say, I think Mr. Leisure is in error.

Judge Bright: What about the witness's statement? That is evidence. He has admitted certain errors.

Mr. Wright: He has admitted certain errors. There are on this chart the distribution of the films of eight companies in 92 cities. That means a consideration of 700-odd situations. Now, I submit that the fact that he may have made errors in 5, 10 or 15 of those does not at all disturb the prima facie validity of the chart as such when it is considered particularly that this is only a stepping stone to ultimate statements which would be totally unaffected by some of these alleged discrepancies that have been brought out.

Mr. Leisure: If your Honor please, the state of the record seems to be now, Mr. Wright says, if it is left in evidence that I can go ahead and cross-examine the witness as to those 28 cities. I do not propose to burden the Court with anything of that kind. I picked

(3203)

out three situations out of 28—I have them all here; I can read them to you—which I thought shows clearly to the Court that the total is wrong, that it should be enough to exclude it.

I have one of two courses open, either to take the Court's time and cross-examine him on 28 cities showing that they are each one wrong, or calling a rebuttal witness and showing that Mr. Wright's exhibit is wrong.

Mr. Wright: I suggest you cross examine him.

Mr. Leisure: Now, I think he should submit the exhibit to us out of court and we should agree on it. There is not any question about the rightness or

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wrongness of it. He has simply excluded from 28 cities RKO first-run, that is all there is to it. There can't be any dispute about that.

Judge Hand: I think you had better remodel this exhibit out of court. In my opinion I think it will only mix us up.

Mr. Proskauer: For the present I understand the record is that it is stricken?

Mr. Wright: I will examine the witness further.

By Mr. Wright:

Q. Now, Lieutenant Borwick, in connection with your examination of this data, can you tell us the number of towns in which all of the first-run outlets, as the term is (3204) defined in the complaint in this case, were affiliated?

Judge Bright: Read that question.

(Question read.)

Mr. Proskauer: I object to that as an incompetent question by the inclusion of the words "as defined in the complaint in this case."

Judge Hand: Objection sustained. You just cannot have broad conclusions like this put to an expert witness as a foundation for a tabulation. That is just the vice of the table. We do not know exactly what is covers.

Mr. Wright: If the Court please—

Judge Hand: No, we have ruled on that. Put another question. Go on with your witness.

Mr. Wright: Will you mark that with the next exhibit number.

Mr. Proskauer: See if my understanding of the record is correct: I understand that 428 for the present is stricken?

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what the actual clearance in question was? A. That is right, we wrote a number of letters.

Q. And then when you got responses to those requests, (3295)

giving you what the real clearance was, you also included, did you not, that clearance information in your tabulation?

A. That is correct, sir.

Q. So that what you have here is a tabulation, then, is it not, of all of the first-run over second-run in the same town clearance data that was furnished by the defendants in response to our interrogatories? A. Yes, sir.

Judge Goddard: Mr. Raftery said that he submitted to you several hundred but you only account for 77.

The Witness: Well, Mr. Raftery—

Judge Goddard: Why didn't you analyze those others?

The Witness: Because the contracts—there was a space in those contracts for clearance. In most instances that was left blank with no remarks of any kind, so it was impossible to tell whether the clearance—whether there was no clearance at all, or whether there was what is called the usual clearance; clearance that has been prevailing, or whether they merely forgot to insert it in the contract.

Judge Goddard: To get the proper percentages, wouldn't it be proper to include in your figures those contracts where you were satisfied there was no clearance?

The Witness: Well, there was no other—no way of satisfying myself of that fact. I had to work only (3296)

within the framework of the interrogatory material that was available to us.

*Peter M. Borwick—By Plaintiff—Preliminary Cross**Preliminary Cross Examination by Mr. Caskey:*

Q. Lieutenant, I want to clear up one thing. You say with relation to Portland, Maine, that to determine the classification, you looked to see whether or not the picture also played second-run? A. That is right.

Q. We did not furnish you, or were not requested to furnish you, any second-run data as to the cities between 25 thousand 50 thousand, is that correct? A. You weren't required to furnish that?

Q. Yes, and did not. A. Yes, you were.

Q. Wait a minute. We only furnished on the specimen picture, we furnished first-run on the 412 cities, is that correct? We furnished first and second-run on cities of 50,000 and more? A. That is right.

Q. And we furnished first, second and third on 200,000 and more, is that right? A. That's right.

Q. So we did not furnish second-runs on the group of cities between 25 and 50,000? A. That is right.

Q. How did you operate there? A. Why, in many instances it merely says the clearance provision, opposite the name of the theatre—in answer to interrogatories—merely says 20 days over second run, regardless of whether you gave us information as to the theatre that played second-run. (3297)

Obviously that is the answer.

Q. If it listed various theatres with different dates, different specifications, what did you do? A. Well, for instance?

Q. Well, I have here Montclair, New Jersey, which reads, "14 days after first-run Newark, 14 days ahead of Bloomfield, Watsessing, Caldwell and Little Falls, 30 days ahead of Verona. A. We don't do a thing, we just discarded it, because it said nothing with reference to second-run—what was that town in question?

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Q. Montclair. A. It said nothing with reference to second-run in Montclair, so we did not use any of that information.

Q. So that is not charted? A. That's right.

Mr. Proskauer: A very selective chart.

Mr. Caskey: I submit this exhibit is not a fair representation of the data that is in evidence.

Mr. Wright: Just a moment.

Direct Examination resumed by Mr. Wright:

Q. Lieutenant Borwick, I think when you answered Mr. Caskey's question as to what he furnished you you said that he did furnish you with all clearances in towns over 50,000 as to first and second runs. Now, the fact is that that is what his company and all of these companies were requested to furnish, isn't that right? A. That is right.

(3298)

Q. And no instance were you actually furnished with all of the clearance data that was requested, isn't that right?

A. No, I did not mean to give that impression.

Q. What you were furnished with was whatever they supplied in response to the original interrogatory and subsequent letter requests and you took and tabulated everything that was furnished that was susceptible to tabulation in this form, isn't that right? A. That is correct, sir.

By Mr. Caskey:

Q. In the contract that I just read to you in Montclair, the clearance of first-run over any subsequent run in Montclair is zero, is it not? A. Not necessarily.

Q. Well, you had before you the data which on its face does not grant clearance of first-run Montclair over any other run. That is what you had in front of you, wasn't it?

A. There is nothing there which says—

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. Will you answer my question? This is the very pink sheet you had in front of you? A. That is right.

Q. It does not grant the first-run exhibitor any clearance over any other run in Montclair on its face, does it? A. On its face, it does not.

Q. So it should have been classified as zero, should it not?

A. Now, just a moment, Mr. Caskey. This information is (3299)

not complete—we believe it is not complete, because in many instances we came across situations where no clearance was mentioned or, for instance, we will say, "14 days." Well, "14 days" over what? We did not know whether it was 14 days over an adjoining town, I mean an adjacent town, over a second run, so if it wasn't specified, we did not include it.

Q. You are doing a tabulating job? A. That is right.

Q. Making an exhibit for the convenience of the Court, which is supposed to reflect what is in these two pink volumes? A. That is right.

Q. And you used nothing except the two pink volumes?

A. That is right.

Q. Only what is in evidence in this case? A. That is right.

Q. What you had to work with showed that there was no clearance between first-run and second-run in Montclair, is that not correct? A. I don't know that from the record.

Q. You can't say that he granted no clearance there? You cannot say that those words grant no clearance? A. I can't say that. It says nothing about first-run having clearance over second-run in Montclair, and I don't know what the first-run clearance—

Q. If you were doing a tabulating job, wasn't it your duty to put down zero, whether you thought it was right or (3300)

wrong? A. Not necessarily. All depends on your methods of tabulating.

Colloquy

Judge Bright: In your tabulating did you put down what you thought was right and leave out what you thought was wrong?

The Witness: Not at all. We left out those situations in which the facts were not clear.

Judge Hand: I can tell you one thing right now, Mr. Wright, we are not going to receive this exhibit, as far as I am concerned, unless it is accompanied by correcting statements which will change the tabulation as made. It has got to be.

There is no doubt that it has got to. Maybe you are right in your contention that where they say nothing about it, there is still a clearance, but that has got to appear before we take a tabulation in here such as this.

Mr. Wright: If the Court please, the tabulation is not meant to suggest to the Court in any way that situations where clearance information was not furnished, where the data supplied to us merely said None or indicated no clearance over the succeeding town, we make no contention that this tabulation shows anything with reference to the existence or non-existence of clearance.

(3301) Judge Hand: It has got to show how many of those cases there are.

Mr. Wright: That is, in those situations.

Judge Hand: It has got to show how many of those cases there are. We are not going to take a thing like this, which merely gives one side of the argument and says nothing about the facts which have to be excluded, the data which has to be excluded in order to support that side of the argument. There is no use arguing this any more. This will be excluded unless it is corrected by some tabulation of some sort.

Colloquy

Mr. Wright: Do you wish to have added to this the number of situations in which we were furnished with data where the defendants' contracts or the summary of the contracts that they gave us said either none or where it was silent as to whether or not—

Judge Hand: That is right.

Mr. Wright: (Continuing) —there was clearance?

Judge Hand: That is right.

Mr. Wright: You wish a breakdown between the situations where the contract said none and where the provision was silent?

Judge Hand: That is all right. I should think that would be good too.

Mr. Wright: All right.

Mr. Proskauer: It would be very much fairer if in (3302).

your categories you followed the conventional phrases in these contracts which have been indicated to you, namely, 7 days, 14 days, 30 days, 60 days, not using these arbitrary figures which correspond to nothing that is known in the industry.

Mr. Wright: When it comes to categories, if the Court please, the figures are susceptible of tabulation, and in grouping one day—

Judge Hand: I suppose so. I don't think much of this category, in view of the cross-examination, but we won't exclude it on that ground. It will go in with such infirmities as inhere in such a prospective exhibit.

Mr. Wright: That is inevitable, and we shall supply that supplemental list.

One thing more, if the Court please, does the Court understand that there is only one clearance involved there for each town; that actually these numbers here, which refer to contracts, actually are substantially

Colloquy

coextensive with the number of towns covered, that is, that Loew figure of 275 means that approximately—

Mr. Davis: 340.

Mr. Wright: (Continuing) —or 340 of the clearances in approximately 340 of those town situations were tabulated.

(3303) Judge Goddard: You mean 340 referred to cities, not to contracts?

Mr. Wright: It refers to the single contract clearance, but those were furnished one for each city.

Judge Goddard: Would you answer my question so I at least get it clear? Does that 340 in the first column refer to cities or does it refer to contracts?

Mr. Wright: It refers to both, if the Court please. It refers to one contract for one picture in one city. That was the way the data was supplied. That I think should be understood in appraising the extent—

Judge Goddard: I think you could make your heading a little bit clearer. When we take this up, we won't remember what you told us now.

Mr. Wright: We can change the heading in any way that you think would—

Judge Bright: It says Number of Situations, I understand it. It apparently refers to number of contracts.

Mr. Wright: No; there was submitted to us in the interrogatory answer—we asked for the data as to each of these towns with respect to one picture, that is, one contract, which would presumably be typical of the contracts made for all pictures during the season, inasmuch as clearance does not vary from picture to picture. That infirmity, if it is an infirmity, is inherent in the data and the method that we pur-

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sued in attempting to assemble the information.

(3304)

The purpose of that, of course, was to relieve the defendants of the burden of examining 40 or 50 contracts made during a season to determine the clearance in a town, inasmuch as we are both satisfied that there isn't any substantial variation during the season. Therefore, the contract clearance with respect to only one picture was examined in each instance, but that represents, on this tabulation, a different town in each instance, and the extent of the coverage is represented by a comparison of the total numbers at the bottom here with the total towns to which the interrogatories were directed, that is, in the case of Loew, 340 against 420. I think the examination—

Judge Hand: Please go on. We cannot have so much talk.

(Marked Government's Exhibit 442 for identification.)

By Mr. Wright:

Q. I will show you this Exhibit 442 for identification, entitled "Distribution of feature film exhibition contracts between distributor defendants and exhibitors by the distances covered in clearance terms, 1943-1944 season," and can you tell the Court exactly how you prepared that tabulation?

(3305)

Judge Goddard: Mr. Wright, isn't it possible that you and other counsel could stipulate some of these things instead of going through them?

Mr. Raftery: This simply is the second obscure one. Those are the only two obscure ones I have found.

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Mr. Wright: There could not be any dispute between us as to how these were prepared or what data was used. There is no question about that.

Mr. Frohlich: There is a very serious question about that, Mr. Wright.

Judge Hand: We cannot enlarge this. Go on with your case, and if they object to something, why, we will admit it or exclude it.

Q. (Continuing) Will you just tell the Court what you did in preparing this tabulation? A. This tabulation was prepared in a manner similar to the previous one. This merely represents the situations where one—where the exhibitor in one town gets clearance over an exhibitor in another town. The same information was used as on the previous exhibit. The number of miles merely represents the distance between the town which takes clearance over the surrounding towns over which clearance is taken.

Q. And again you have, I notice, a smaller number of actual contract clearances that are tabulated here than you had in the other chart? A. That's right.
(3306)

Q. Why it that? A. Because the contracts themselves were silent as to such provisions or no information was made available to us.

Q. That is, where the contract clearance did not specify any clearance over another town, you did not include that in this tabulation? A. That's right.

Q. This was limited only to those situations where it appeared from the data furnished that there was some clearance in favor of one town over another, is that right? A. That is correct.

Q. And you included in this tabulation all of those situations for which they supplied you with data where such clearances appeared, isn't that right? A. That's right.

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Q. And then in computing those distances, you simply took the mileage as shown between the town taking the clearance and the farthest town over which the clearance was taken, in accordance with road maps, is that right? A. That is right, Automobile Association road maps.

Judge Bright: You made the computation? You computed the mileage; it was not on the contract?

The Witness: No, sir, that is right.

Judge Hand: Did this cover all towns of a certain size and certain population in the United States?

Mr. Wright: The data requested was for the same (3306A)

towns as is covered by the other, that is, we asked for first-run clearance in all towns over 25,000, which was 400-odd.

(3307)

Judge Hand: With respect to clearances, the situation between a country district and a suburb is often widely different, so that you do not get any standard at all. You take a place like—

Mr. Proskauer: Prescott, Arizona.

Judge Hand: —50 miles, perhaps, out of New York, or 25, or whatever your figure would be, it would be right here, with commuters coming in all the time, shoppers coming in all the time. You take it up in the Adirondacks and it is a different world, only a few people that can afford it, and a few joyriders in the summer will go to these things that far away, so that I do not think a tabulation based on mileage, universally applied, is very inclusive.

Mr. Wright: I agree with your Honor that it is not inclusive. However, there was an attempt to secure here, by the interrogatory data, uniform samples for each of the distributors. Had we gotten from them

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reasonably complete data, we would have had a better table. We did the best we could with what we got.

Judge Hand: Don't begin to complain again. As they view it, it is very tiresome. The data that you could have got, why didn't you get more, if you didn't like the data you got, or think it is insufficient?

Mr. Wright: I have pointed out that where there (3308)

was deficiency—that these were checked for deficiencies—that we requested additional data in those instances. In some instances we got it, in others we did not, but in any event we had no choice but to take whatever we ultimately got and to tabulate it, and that is what was done.

Judge Bright: But your exhibit is based on stuff that is not in the information furnished by the company.

Mr. Caskey: That is right.

Mr. Wright: As to the mileage computations, as to the exhibit, that is dependent upon a consideration of what was done with reference to material not in evidence, there is no question about that, except that in some instances, I might say, of course, the first-run clearance itself is stated in terms of so many days over a town within 25 miles, or 20 miles, or 15, as the case may be.

By Mr. Caskey:

Q. Lieutenant Borwick, I show you from the volume of answers to interrogatories on Fox the one pertaining to Stamford, Connecticut, which reads, "60 days clearance in Stamford, 30 days over Darien and Springdale, 14 days over Greenwich and New Canaan. Now, where did you put that

Peter M. Borwick—By Plaintiff—Preliminary Cross

In this chart? A. Well, what we did was to list the distances (3309)

from Stamford to Darien and Springdale and New Canaan.

Q. Yes. A. And took the distances, maximum distances of any of these three cities and put that down as one indicating one situation.

Q. Well now, as I understand it, the town of Stamford and the town of New Canaan are contiguous. How did you treat that? A. We just took the points as indicated on the road maps. If, of course, if the two dots were on top of each other, why, it was the distance of those two dots to Stamford.

Q. The town of Greenwich, Connecticut, and the town of Stamford are contiguous. How did you treat that? A. Well, as I just said, you could not tell from a road map whether it was contiguous or not, so we took the distance from Stamford to whatever town was the maximum distance from Stamford.

Q. I suggest there is no distance. A. Well, we just, as I said, we took the AAA map.

Q. You did not attempt to measure from theatre to theatre? A. No, of course.

Judge Bright: What did you do, scale it off on the map?

The Witness: Yes, that is correct, sir.

Judge Bright: With a ruler?

The Witness: Yes. You know, the automobile (3310)

maps measure off short distances and we took those and summed up the total.

Q. What did you do for New York City? How did you treat New York City? A. You show me what clearance was on New York City.

Q. Never mind that. What did you do with Boise, Idaho, pictures playing the Pinney Theatre to have seven days clear-

Peter M. Borwick—By Plaintiff—Preliminary Cross

ance over Meridan, Nampa and Caldwell? A. Well, we followed the same procedure, we measured the distance from Boise, Idaho, to each one of these towns, as shown on the map, point to point, and then took the maximum distance from Boise to the town which is—that is, the town which is the maximum distance from Boise indicates the figure as included in here.

Q. What comparison is it to show that the clearance of Stamford, Connecticut, extends seven miles to the theatre in New Canaan, Connecticut, and two miles to the theatre in Greenwich, Connecticut and five miles to the theatre in Darien, Connecticut, and that the clearance of the Pinney Theatre in Boise, Idaho, extends 40 miles to Caldwell? A. I am sorry, I did not understand your question.

Q. I say, the purpose of this chart is to compare various things, is it not? A. Well, it is to summarize the areas—summarize in simplest and convenient forms the data as (3311)

indicated in these answers to interrogatories in terms of area covered by clearances.

Q. If your figures are right, you put Stamford here in "10 or less"? A. That is correct, is the distance from Stamford to any one of these points mentioned in the clearance was that distance.

Q. And you put Boise, Idaho, probably in "51 and over"? A. I can't tell you where I put Boise, Idaho.

Q. I think that is correct, if I follow you. A. Wait a minute.

Q. What does that comparison established? A. What does that comparison establish?

Q. Yes, sir. A. I am not interested in what it establishes. I was merely interested in summarizing the facts.

Q. Your general observation, of course, is that in the western part of the country the area of clearance is greater than in the eastern part of the country? A. Well, it could be. I wouldn't be sure unless I had these tabulations.

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. After having worked on these 15, 16-hundred contracts; you are not able to say that that is so? A. Well, I don't want to make a general statement unless I have something to back it up.
(3312)

By Mr. Seymour:

Q. Do I understand correctly that where there were three places over which a first-run theatre had clearance, one of them one mile, one of them two miles and one of them fifteen miles, you only used the 15 miles on this chart? A. Yes because this chart attempts to show the maximum distance covered by these clearances.

Q. Where is there anything on the chart indicating that only the maximum was used? A. Right here, the footnote 1, bottom of the table.

Q. The farthest city, is that it? A. Yes, that is right.

Q. So that this does not purport to be a summary of the mileage in the clearance contracts, but only a summary of the farthest city? A. That is right.

Q. Let me ask you this, if you put your mileage categories differently, if you had used five miles instead of ten miles as the breaking point, you would have gotten quite a different picture, wouldn't you? A. I wouldn't say that at all.

Q. Any more than you would have got a different picture on the last exhibit by using different categories, is that right? A. That's right.

Mr. Davis: Why would it be different if he took five miles instead of ten?

(3313)

Mr. Proskauer: Well, he defends any choice he makes, and I am not going to examine him about it.

Mr. Davis: I am going to examine.

Peter M. Borwick—By Plaintiff—Preliminary Cross

By Mr. Davis:

Q. Who suggested to you these 10-mile steps? A. This is my own idea, Mr. Davis.

Q. Why did you adopt 10 miles as the category? A. I could have adopted intervals of five miles.

Q. Yes. A. It would have meant we would have had ten 5-miles intervals instead of five 10-miles intervals.

Q. If you had adopted that, you would have gotten a different-looking picture? A. As I told Mr. Seymour, I am not sure that we would have. I don't know.

Q. What do you think of the probabilities? Don't you think it is probable you would have got a different picture? A. Well, no, because examining this kind of data, with hundreds of towns involved, in clearance, I would have to have a very prodigious memory to give you offhand an answer to a question like that.

Q. I am asking you if it is true as a matter of simple mathematical probability that if you had taken 5 miles instead of 10 you would have a different figure in your list of contracts and different figures in your percentages of the total? A. Well, sure, any different type of frequency dis-

(3314)
tribution, Mr. Davis, you would use, you would get different percentages.

Q. I would suppose so, and I am surprised that you should hesitate to admit it. A. Well, no, I did not understand your question. Your question wasn't that at all.

Q. Where did you get the 275— A. I did not understand that question at all.

Q. Where did you get the 275 contracts of Loew that you say you examined? A. That is, again, answers to interrogatories.

Q. Did you find in any of those contracts a mileage figure stated for clearance? A. Any Loew's contract?

Peter M. Borwick—By Plaintiff—Preliminary Cross

Q. Yes. A. I can't say offhand. I know in some contracts there were—for instance, they would say, covering an area of 25 miles, or includes a number of counties.

Q. Where they said covered an area of 25 miles, you took that to be 25 miles measured by automobile road or 25 miles measured by radius from the center? A. By automobile road, of course.

Q. And you think if a contract said clearance over all theatres within 25 miles that meant road miles and not surveyor's miles? A. I don't know what they meant. I imagine people travel on road miles, Mr. Davis, rather than as the (3315) crow flies.

Q. How did you interpret that phrase, if it was used? A. Well, I interpreted it as—well, it is subject to any interpretation, for that matter.

Judge Bright: How did you interpret it, is the question?

The Witness: I interpreted it as road miles, of course.

Q. Measured by ruler on an automobile map? A. Measured by a ruler or, if the automobile map gave the distances, I used the distances and added them up.

Q. Can you tell me again whether or not you found in any Loew contracts a clearance measured by mileage other than by the name of the town over which clearance was granted? A. I could not tell you unless I examined all your exhibits.

Q. You do not recollect any at this moment? A. No, I do not. I can't answer either way.

Judge Bright: I wonder, Mr. Wright, what you claim is the value of this exhibit?

Mr. Wright: All that this exhibit does, if your Honor please, is merely show that extensive clearances

Peter M. Borwick—By Plaintiff—Preliminary Cross

(3316) are regularly granted by these defendants in favor of one town over another, that is, that first-run control in a particular town actually may mean, and frequently does mean, control over first-run exhibitions in fairly wide areas.

Judge Bright: Granted as against other defendants and independents?

Mr. Wright: Yes.

Judge Bright: Then what is the value of this particular exhibit?

Mr. Wright: The exhibit is not offered to show any differences in treatment between a clearance granted to independent theatres and affiliated theatres in this regard. It simply is intended to show the general characteristics of clearance as such, clearance as an institution in this particular industry.

Judge Hand: It is the old argument you have been making, apparently, that there is inherent vice in clearance and yet clearance is inevitable.

We will adjourn for lunch.

(Recess to 2:15 p.m.)

(3317)

AFTERNOON SESSION.

PETER M. BORWICK, resumed the stand.

Mr. Caskey: We have no further cross examination. We object to the exhibit on the ground of relevancy and materiality.

Mr. Wright: We offer the exhibit.

Judge Hand: We will receive it for what it is worth. I do not think it is worth much.

Colloquy

(Government's Exhibit 442 for identification received in evidence.)

Mr. Wright: Now, if the Court please, I have here a series of charts but I propose to finish the presentation of our case today, come what may. Now I have these charts here. I have given copies to the defendants. I can tell the Court what they are. If any defendant objects to them and the Court does not want them, I shall not offer that chart. If there is any one which is of interest to the Court and the defendant objects, I will offer that, but I hope I can shorten this up by telling you what they are, and we will find out whether there are objections.

Judge Hand: Yes, all right.

Mr. Wright: Now we took as to that one picture that you have the chart in evidence there for each company as showing the distribution of rentals in the towns over 25,000 on that picture first-run as compared to total revenue and total exhibitions in the

(3318)

various exchange areas. Now we took the same pictures and tabulated the data in the interrogatories showing the revenue in the cities over a million from the first four runs, which was the data we got; the revenue in the cities between 200,000 and a million received from the first three runs; and the cities between 50,000 and 200,000 where we got the first two runs, the revenue received from the first two runs.

In each of these cases these charts are subject to similar infirmities as those already discussed, in that there is not complete data as to all situations in all of the charts. The data, however, is complete as to certain cities in each one, and the extent to which it is incomplete and the reasons for incompleteness are reflected in footnotes on each chart.

Colloquy

Now that data is simply a refinement of the study of first-run control that we have already attempted to make. I think it is useful data, but as I say, I have no desire to inflict it upon the Court if the Court is not interested in any of it, regardless of what the defendants' position may be. If the Court wants any of it, and if there is objection from the defendants, I still won't insist on it, but I do have it here and I have copies and I offer it to this extent.

Judge Hand: Have you gentlemen been over these
(3319) graphs?

Mr. Davis: I have been over them, your Honor, as to Loew's. The only objection I make to them is the same objection I made this morning, that they are misleading in this: They state the percentage of first-run rentals from affiliated theatres, one hundred per cent for instance in Manhattan. Now as a matter of fact that one hundred per cent was from Loew's own theatre. They have it on one picture, one picture in Loew's own theatre, is rated as one hundred per cent of the first-run rental from affiliated theatres, which is a distorted picture entirely. There is an implication that the revenue derived is from a consolidated source consisting of the five defendants.

Now the same thing as to Exhibit 447, cities from 200,000 to one million population. There are 38 cities on that list, and it shows—it is a very pretty chart—it shows that one hundred per cent of all film rentals received by Loew's, first-run rentals, was received from affiliated theatres, one hundred per cent the whole way down the line with the exception of Portland, Oregon. As a matter of fact, 24 of those theatres were Loew's; one was an independent; five were Fox; one RKO, and seven Paramount. And to say

Colloquy

that that is one hundred per cent affiliated is, I think, a distortion of the facts. I do not challenge the ex-

(3320)

hibits in any other particular.

Mr. Seymour: As far as Paramount is concerned, we have spot checked the charts; we have not had time to do more than that; we found a few errors; and the same observation applies that Mr. Davis made, that this business of taking a hundred per cent where the company has some interest in a theatre does distort the thing. Now, rather than take time to point out the errors, I am perfectly willing to do this: if your Honors want to receive these charts and if they are received against others, to have them received and then send the Government a list of the errors which we found, with the understanding that they will physically correct the charts at sometime.

Judge Hand: Yes; and particularly point out in your briefs the situation with regard to your own theatres, which of course you all will, I am perfectly sure. I think we will receive these.

Mr. Raftery: May I make a correction in 499? I am not objecting to the charts. In 499, footnote 4 reads, "Blanket contract." That is the contract we have with Loew's for second, third and fourth run in metropolitan New York. For the record, the contract is a single picture contract for a picture called Stage Door Canteen, made between Loew's Inc. and United Artists. The terms are 25 per cent of the gross re-

(3321)

ceipts until the combined gross receipts of all suburban runs, as we call them—that is, everything after the first-run in Loew's in Metropolitan New York—until those combined receipts equal fifty per cent profit of our film rental. Then the overplus of receipts are

Colloquy

divided, two-thirds to United Artists and one-third to Loew's. So instead of a blank here for second, third and fourth run, the film rental paid by Loew's for those pictures on those runs was \$163,673. Now that is what the facts show and I will produce a witness if Mr. Wright wants it.

Mr. Wright: There is no question about the facts. The reason the footnote says blanket rental here is that the chart only purported to deal with three runs, and this rental payment, of course, that he is referring to, covers many more runs, and there is no breakdown as between Loew's. That is why for the purpose of the treatment here it is impossible to allocate or show any particular rental for any of those runs, and the notes simply refer to it as the runs as covered by a blanket deal which did not show individual run rental.

Mr. Raftery: The only objection we have is calling it a blanket contract. That is not a blanket contract. It is an individual contract for one picture.

Mr. Wright: There is no question about that.

(3322) Mr. Proskauer: Speaking for Warners, in the chart which was furnished us for Princess O'Rourke, Bronx, Brooklyn and Richmond are shown as first runs—

Judge Hand: The one you propose to offer?

Mr. Proskauer: I am not offering anything. I am speaking of the suggestion—

Judge Hand: The one that Mr. Wright has in his list which he has not yet offered?

Mr. Proskauer: Yes, I am speaking of his suggestion that we let these in—

Judge Hand: All right.

Mr. Proskauer: We heard Mr. Wright and the witness disavow this morning that either Brooklyn,

Colloquy

Bronx or Queens were first-runs; that they were second runs after Manhattan; and yet to get a showing on this chart he lists those Boroughs as showing first-runs. Now I am perfectly willing, having called attention to that, to let that point go, and I will comment on it in my brief, but I would like Mr. Wright to concede that in Manhattan, in Los Angeles and in Philadelphia, all the first-run income was from our own theatres and not from theatres of any other defendant.

Mr. Wright: I think that is perfectly true. Now as to the reason for treating Manhattan, Bronx, Brooklyn, Richmond and Queens first-run separately here, that is the way they were reported in the interrogatory answers to requests, and that is the way they

(3323)

have been set up in the tabulation.

Judge Hand: All right.

Mr. Fröhlich: If your Honors please, the only exhibit that I thought I would object to this afternoon is 456, where Mr. Wright has taken a small group of cities on Cover Girl, from 200,000 to one million population, and he puts in the first and second run rentals.

Now we have been taking a lot of testimony in this case on 92 cities, and I do not want the Court to draw any inference from a small group of ten or fifteen cities. So I have prepared a chart of all of the 92 cities where Cover Girl was shown for the first and second runs, and I would like to put that in together with Mr. Wright's exhibit, and then I have no further objection at all.

Mr. Wright: We have no objection.

Judge Hand: All right. Now Mr. Leisure wishes to be heard.

Colloquy

Mr. Leisure: RKO Exhibit 453, we have gone over that with Mr. Wright, and under the heading, Buffalo, one hundred per cent first-run rentals for affiliated theatres, Mr. Wright concedes that that is an independent theatre and not an affiliated theatre. I wish the record to so show.

Mr. Wright: Correct.

(3324)

Mr. Proskauer: So your Honors may realize that I was not at all captious in my objection, that total of the first column is \$160,000. Those that I mentioned in our own theatres only aggregate only \$101,000.

Judge Hand: Well, that is very important in your brief. We will receive these exhibits and receive Mr. Frohlich's exhibit too.

Mr. Caskey: What are the numbers, Mr. Wright.

Mr. Wright: Those that have just been received, on the ones you have the numbers are 435 to 458 inclusive, but the numbering in the record here will be eight more in each case.

Mr. Davis: Let us get them right.

Mr. Wright: The first one will be 443.

Mr. Caskey: What is the first one?

Mr. Wright: 443, Princess O'Rourke, in cities over one million, first four runs broken down as to New York and five Boroughs.

444, Sweet Rosie O'Grady, same areas, same runs.

445, Let's Face It, same areas, same runs.

446, Lady Takes a Chance, same area, same runs.

447, As Thousands Cheer, same area, same runs.

448, Cover Girl, same area, same runs.

449, Stage Door Canteen, same area, same runs.

Mr. Proskauer: I haven't got a copy of that, Mr.

(3325)

Wright.

Colloquy

Mr. Wright: That is right. That was typed and you will be supplied with those as soon as we can run off an extra set.

450, Christmas Holiday, same area, same runs.

451, Princess O'Rourke, first three runs in the cities with population between 200,000 and a million.

Mr. Proskauer: Let me see that one, will you please.

Mr. Wright: That is 451. Your number on it is 443.

Mr. Proskauer: On 451, I can't do such lightning calculation, but I am reserving the right, if it is not already in the record, to show the information.

Mr. Wright: 451, your picture, Princess O'Rourke, in the first three runs in cities between 200,000 and a million.

Mr. Proskauer: I understand that it is in the record.

Mr. Wright: 452, Sweet Rosie O'Grady, same cities, same runs.

453, Let's Face It, same cities, same runs.

454, Lady Takes a Chance, same cities, same runs.

455, As Thousands Cheer, same cities, same runs.

Mr. Davis: Now may we have a stipulation that

(3325-a)

of the 38 cities that are listed, 24 are Loew's, one is an independent, five Fox, one RKO and seven Paramount?

(3326)

Mr. Wright: That sounds right to me. I accept your figure.

456, Cover Girl, same cities, same runs.

457, Stage Door Canteen, same cities, same runs.

Mr. Proskauer: I haven't that.

Mr. Wright: That will have to be retyped.

Colloquy

458; Christmas Holiday, same cities, same runs.

Mr. Proskauer: I haven't that.

Mr. Wright: That also will have to be another run on the typewriter.

459, the picture Princess O'Rourke, in cities between 50,000 and 200,000, first two runs.

Mr. Proskauer: The difficulty with this is it lumps all together and it looks as though we were all playing this thing when, as a matter of fact, the bulk of it is exhibition in our own theatres.

Mr. Wright: 460, Sweet Rosie O'Grady—

Judge Hand: Wait a minute, Mr. Wright. Are exhibits already in indicative of that fact?

Mr. Wright: That is correct.

Mr. Proskauer: I think we can correct the inference, which I think is wrong there, evidence which is already in the record.

Judge Hand: That is the only thing that we are really interested in, in regard to any of these tabulations, of course.

(3327)

Mr. Wright: That is correct.

Mr. Caskey: Mr. Wright, could you state for the record now for the convenience of counsel the exhibit numbers of the eight cities on interrogatories and the exhibit numbers of the theatre list, which, as I understand it, is the basic data from which all these charts are prepared?

Mr. Wright: May I finish this first?

Mr. Caskey: Yes, certainly.

Mr. Wright: Then I will go back and take that up.

461 is Let's Face It, same cities, same runs.

462 is Cover Girl, same cities, same runs.

463 is As Thousands Cheer, same cities, same runs.

Mr. Davis: Where is that, I haven't got that.

Colloquy

Mr. Wright: Your number on it would be 455.

Mr. Davis: You have put in two As Thousands Cheer. Is this a third one?

Mr. Wright: This is the one that covers the first two runs in cities from fifty to two hundred thousand.

Mr. Davis: I have it. What is the number?

Mr. Wright: 463.

(3328)

Mr. Davis: All right.

Mr. Wright: 464, Lady Takes A Chance, same cities, same runs.

465, Stage Door Canteen, same cities, same runs.

Mr. Proskauer: We haven't got that.

Mr. Wright: You will get a typed copy of that.

466, Christmas Holiday, same cities, same runs.

You will also receive a typed copy of that.

The data reflected in these tabulations, your Honors, are taken from the following exhibits, first, the theatre list, which shows the affiliation of the various theatres involved, are, for Fox, Exhibits 160 and 359; for Loew, Exhibits 163, 163-A and B; for Paramount, Exhibits 161, 162, and 360; for RKO, Exhibits 158 and 159; for Warner, Exhibits 156 and 157.

The interrogatory answers in question which are tabulated here are contained, for Fox, in Exhibits 41 and 42; for Loew, in Exhibits 57-1 through 57-49 and 57-A and B; for Paramount, Exhibit 82; for RKO, Exhibit 94; for Warner the exhibits are 126, 127 and 128; for Columbia 139; for United Artists 369, 369-1 through 369-6; Universal, 365, in two parts.

The tabulations I want to offer are those which were submitted at the conclusion of our case to all of the defendants with respect to the tabulations of data

(3329)

that was furnished in 1939 with reference to three cities, Atlanta, Kansas City—

Colloquy

Mr. Proskauer: Mr. Wright, we do not hear you.

Mr. Wright: —Atlanta, Kansas City and Philadelphia.

Mr. Raftery: That is, submitted to all the defendants?

Mr. Wright: That is my understanding. I will explain to the Court what this data is first. The data I am referring to are tabulations made from interrogatory answers filed by each of the defendants in 1939, showing the rentals received and the play dates of all of their pictures in these three selected cities.

Mr. Proskauer: Which are they?

Mr. Wright: Atlanta, Georgia, Kansas City, Missouri, and Philadelphia, Pennsylvania.

There is for each city a basic tabulation for each distributor. Those are the ones which were submitted respectively to the distributors whose pictures were tabulated on that. There is also a composite tabulation for each of the cities, showing the percentage of affiliated and unaffiliated rental derived from all runs in the cities for all distributors.

Mr. Davis: May we see that summary?

(3330) Mr. Caskey: What changes have been made since these were offered and excluded?

Mr. Wright: These, I do not think, were offered and excluded. They were submitted to you, instead of being offered at that time, with the thought that any changes could be made by stipulation.

Mr. Raftery: May I see one?

Mr. Wright: Yes. I will just ask to have this Atlanta summary marked with the next plaintiff's exhibit number, and I will distribute copies to you gentlemen. There are three for the Court.

Colloquy

(Marked Government's Exhibit 467 for identification.)

Mr. Wright: I think, if the Court pleases, that the chart is self-explanatory and it shows on its face the data from which it was derived.

Mr. Proskauer: Mr. Wright, you are not offering New York, to which I made objection?

Mr. Wright: No, I am not.

Mr. Davis: Let us make sure that we are talking about the same thing.

Mr. Caskey: Mr. Wright, I have understood—

Mr. Wright: I will ask to have marked 468 for identification a similar summary for Kansas City.

(Marked Government's Exhibit 468 for identification.)

Mr. Caskey: With regard to 468, the attempt is (3331)

to show that the first-run revenue, 99.5 per cent, came from affiliated theatres, and the vice of the exhibit is that it neglects to state what is in evidence, namely, that the RKO revenue, in the amount of \$29,000, came from its own theatre; the Fox revenue came from two theatres, two other theatres which it operates; that the Loew revenues came from Loew's Midland Theatre; and that the Paramount revenue came from the Newhan Theatre. So that by the process of lumping four separate groups of theatres, operated by four separate defendants, you arrive at the fact that among the four they played all the product. The only vice of these charts, Atlanta, Kansas City and Philadelphia, is in the selection of the cities. If you start out with a city where you know that the first-runs are operated by these defendants and the second-runs are

Colloquy

operated by these defendants, then, as Judge Hand observed this morning, you get an exhibit that shows those theatres played all the pictures.

In addition to that, we told Mr. Wright that we objected to the phraseology "preferred runs", and I understand that that was to be corrected.

Mr. Wright: I think the footnote shows that preferred runs means first, second and third. If you want to strike out the "preferred" and just substitute

(3332)

first, second and third runs, that is agreeable to us.

Mr. Caskey: There again, your Honors, I think it appears from one of the decisions of the Appeal Board, which your Honors admitted, in Kansas City there is a second-run theatre, the Boswell theatre, which is one of the finest theatres, not only in Kansas City, but anywhere, and it runs second-run in Kansas City and is operated by National Theatres. It has what the Appeal Board calls—the industry calls—a clear second-run, that is, it is the only theatre in Kansas City which plays 28 days after first-run. So, by selection, you get the result that all the second-run revenue in Kansas City comes from one theatre which National Theatres operates. The whole problem is purely one of selection.

Judge Hand: I assume that you will show the infirmities of selection in your brief and argue them.

Mr. Davis: May I make one more suggestion, because there is something there which I do not think Mr. Wright wants to commit himself to. It is a fly speck in the Atlanta chart. On the column of the Atlanta gross, he has it, as to each distributor, Atlanta gross is 3/10ths of 1 per cent of the national gross. It cannot be uniform for all of them, and it is not uniform on the figures in the column out of which

Colloquy

(3333)

the computation grows. There is a manifest mathematical error in that column.

Mr. Wright: If there is a mathematical error in the column, it clearly ought to be corrected. I must say I am not enough of a mathematician—

Mr. Davis: I think if you will look at it you won't want to say it is the same in every case.

Mr. Wright: I would say clearly, as to Universal, the figure—no, the figures are too large for me to handle at a glance, I confess.

Mr. Davis: They are to me, but I just know there is something wrong with that column.

Judge Bright: He refers to the column marked Atlanta Gross. You give each one of them 3 per cent of the gross total and your total is 3 per cent of the national gross. There must be some discrepancy.

Mr. Wright: Whatever the discrepancy is, it is apparent from the face of the chart. If there is an error there, it will be, I can assure you, corrected. I cannot stand here and correct it because my mathematical ability is not that good.

Mr. Davis: I think if I were you, I would just strike that column out entirely.

(Marked Government's Exhibit 469 for identification.)

Mr. Caskey: I wonder if I may, Judge Hand—

(3334)

Judge Hand: I should think there was trouble with your percentages, perhaps right through, but I don't understand it.

Mr. Wright: I beg your pardon?

Judge Hand: I should think there was trouble with your percentages right through. I don't understand it.

Colloquy

Mr. Wright: You mean because of the apparent uniformity?

Judge Hand: Well, I was looking at 468 now. No, they are not uniform.

Mr. Wright: That is the percentage—

Judge Hand: What is the 5 per cent, 5 per cent of what?

Mr. Wright: The 5 per cent figure there opposite the word "Loew's"? That is the percentage which \$176,331, the Kansas City gross, is supposed to bear to the figure \$37,658,719, the gross, national gross, for those pictures.

Judge Hand: Say that again.

Mr. Wright: The figure \$176,331 represents the total gross for the 49 Loew features, and from all runs in Kansas City. The proportion that that gross bears to the total gross received from those features from all runs all over the country, that is, \$37,658,719, is .5, that is 5/10ths of 1 per cent.

(3335)

Mr. Davis: My mental arithmetic was always poor, but I do not believe that is so.

Judge Hand: We cannot do this here on the bench anyway. I should think, if it was very important, that you should have it corrected—

Mr. Wright: I agree.

Judge Hand: —if it goes in. Maybe it is.

Mr. Wright: I agree with that, I think it is.

Judge Bright: If you take half of one per cent of 37 million dollars, it isn't \$176,000. It is nearer \$180,000.

Mr. Wright: \$37,000,000, I suppose, 3 per cent would be about something less than one million. Half of one per cent would be something about a sixth of that.

Peter M. Borwick—By Plaintiff—Direct

Judge Bright: If you multiply the first two figures of 37,000,000 by 5 you get 185.

Mr. Caskey: They are obviously adjusted to the next highest—

Judge Bright: They have taken the fraction and made a round figure.

Mr. Caskey: Yes; you can see that the national gross in Kansas City, to be 5 per cent, would have to be \$741,000.

Mr. Wright: If the Court desires to have us carry out those percentages, we will do them to just as (3336)

many decimal places your Honors think is appropriate.

Judge Bright: Don't we have to admit 5 per cent is exactly half of it?

Mr. Wright: They are, on their face, to the nearest 1/10th of 1 per cent. That, I think, is plain on the face of the chart.

Mr. Caskey: With regard to the Philadelphia one, Mr. Wright, we would like to have the heading "All Preferred Runs" go out and specification as to what it is.

By Mr. Wright:

Q. That, I believe, Lieutenant, refers to the first three runs? A. If you will give me the chart.

Q. You have the chart there in front of you with reference to Philadelphia.

Mr. Proskauer: While the Lieutenant is looking at that, may I, with the Court's permission, ask you: You selected these three cities. Are you making any contention that those three cities are typical of a national situation? And if so, have you got any evidence of that?

Colloquy

Mr. Wright: We selected the three cities simply to show that in a situation where, concededly, all or substantially all of the first-run theatres are affiliated theatres, that the total film rentals derived from those cities, about 70 per cent comes through the affiliated outlets.

(3337)

Mr. Proskauer: I am perfectly aware of that and you heard the historical explanation as to how we came to own these theatres, this large number of first-run theatres in Philadelphia, and for that reason you chose to choose Philadelphia. Now, with the Court's permission I should like to have you answer my question: Do you claim that these three cities are fairly typical of a national situation?

Mr. Wright: They are only typical to the extent that they reflect the proportions of film rental derived from affiliated and unaffiliated theatres and other situations where the first-run theatre setup is substantially the same. There are many other situations in this country besides these where all or substantially all of the first-run theatres are affiliated.

Mr. Proskauer: In other words, all you are claiming is that where you have a situation like this one; that happens to exist in Philadelphia, this is typical of such situations?

Mr. Wright: Precisely.

Mr. Proskauer: But not of others. That is the way I understand it.

Mr. Wright: Yes.

Judge Hand: He tenders evidence of sore spots

(3338)

and then he is at liberty to argue either that you should abolish the sore spots or—

Peter M. Borwick—By Plaintiff—Direct

Mr. Proskauer: I am trying to segregate the sore spot problem from the general problem.

Mr. Caskey: Lieutenant, we want to know what those preferred runs are on the Philadelphia chart, and the number of theatres.

The Witness: Well, if Mr. Wright will kindly give me the basic tables from which was copied the information, I can tell you just exactly what it included.

By Mr. Wright:

Q. (Handing paper to witness.) A. This table itself, Mr. Wright, that you gave me, does not specify what those preferred runs are, but I know there are some basic tables which specify, which have a footnote. This one was omitted for some reason or other, but there is another basic table from one of the other towns or one of the other distributors, which indicates what those preferred runs are; whether they are first, second and third or first, second, third and fourth, I am not sure offhand.

Q. Your Kansas City footnote indicates that you took first, second and third in that town. I do not find a similar footnote for— A. There is one.

Q. —Philadelphia.

Mr. Caskey: Mr. Wright, you will concede that (3339)

in Kansas City that the so-called preferred runs constitute first-runs operated by the four defendants separately, the Plaza Theatre, which is second-run, and the Isis Theatre, third-run, and nothing else.

Mr. Wright: As far as the separate operation is concerned, I believe the record shows that there was a pool there during part of the season, which was dissolved during the season.

Peter M. Borwick—By Plaintiff—Direct

Mr. Caskey: So the rest of it is correct, that the second-run theatre is the Plaza and the third-run theatre is the Isis, and they are the only two theatres that are included in the data under the right portion of the chart, in addition to the first-runs.

Mr. Wright: That, I think, is undubitably correct.

Mr. Caskey: Can we get the number of theatres involved in the other two charts—the other one?

Q. These basic tables that we have here do not show any footnote as to what those preferred runs are. Do you have a work sheet here that shows what they were? A. I think we sent work sheets for the basic tables, for these three cities, to all the defendants for any proper corrections they would care to make and those indicate—they are classified by runs, first, second, third and fourth, and the theatres are specified (3340)

as to what particular defendant has a financial interest. I believe, however, Mr. Wright, that this tabulation on Philadelphia covers, that is, the phrase, "All Preferred Runs," covers first, second and third only.

Q. First, second and third? A. First, second and third, that is right.

Q. Only? A. Only.

Mr. Caskey: Why not leave it that way, unless there is a correction to be made in the record?

Mr. Wright: Yes. You apparently have the sheets which show the fact.

We will offer these last exhibits, 467, 468 and 469 for identification, these three summary sheets on those towns.

Judge Hand: All right, we will admit them.

Mr. Wright: We had submitted—

Judge Hand: We have admitted 443 to 466 and marked them in evidence.

Colloquy

Mr. Wright: And we are now offering 467, 468 and 469. I understand those are admitted?

Judge Hand: We have admitted those.

(Government's Exhibits 467, 468 and 469 for identification received in evidence.)

Mr. Proskauer: Are we going to see those before they are marked?

(3341)

Mr. Wright: You have copies.

Mr. Caskey: 467 is Atlanta?

Mr. Wright: Yes.

Mr. Caskey: 468 is Kansas City?

Mr. Wright: Yes.

Mr. Caskey: 469 is Philadelphia?

Mr. Wright: Yes.

I have, if the Court please, these additional basic tabulations that were referred to here, which were submitted to the defendants, and which contain the picture by picture breakdown of each distributor in each city of these rentals. I have no desire to put those into the record unless the Court has some interest in having them in, or the defendants. If anybody wants them in, they are here.

Judge Hand: What do the defendants say to that?

(3342)

Mr. Proskauer: I don't know what he is talking about.

Mr. Raftery: We have never seen that and do not want to see it.

Mr. Proskauer: I suggest that Mr. Wright put his case in. I have not asked him to put in anything else. I do not know what he is talking about. I have not any desires about it at all.

Mr. Wright: That concludes, then, our offer of tabular material subject to our supplying the attached

Colloquy

list of division of product, which is to supplement Exhibit 428, and the list of clearance situations where the data provided shows no clearance or was not supplied, which is to be attached, as I understand it, to Exhibit 441 for identification, which was not received in evidence, but which the Court indicated it would receive if we attached the list showing the extent to which the other data was not supplied.

Judge Hand: Yes.

Mr. Caskey: I assume we will have an opportunity to see it and cross-examine before it is received?

Judge Hand: You mean the one he has in his hand?

Mr. Caskey: That has been excluded. Now, if he gets something else up we want to see it.

(3343)

Mr. Wright: I do not propose to get anything else up. I propose merely to supplement this in accordance with the Court's suggestion with a list of the number of situations supplied which either showed that the contract set no clearance or where the data was silent as to whether there was clearance or not.

Judge Hand: That is not much of a job, is it?

Mr. Wright: I think we can get that in probably by tomorrow morning.

Judge Hand: All right. They are entitled to see it, of course.

Mr. Wright: Of course, before we submit it.

Judge Hand: I do not believe they will want to do much talking about that.

Judge Bright: Does the Government rest?

Mr. Proskauer: The trouble with these charts is, they have been put in in categories which are not conventional in the trade. I have never seen a more misleading chart than that, by reason of the arbitrary

Colloquy

selection of categories of days of clearance which bear no relation to anything that is conventional in the trade.

Judge Hand: Well, I cannot recommend any medicine to be applied in such a situation.

Mr. Proskauer: Well, we will have to supply our own medicine.

(3344)

Judge Hand: All right, and I have no doubt you will.

Mr. Proskauer: I just wanted the Court to know what the sickness was.

Judge Hand: Yes.

Mr. Wright: I think that is all.

(Witness excused.)

The Clerk: Some of the exhibits have not been marked.

Judge Hand: Yes. You see there is a sad gap here between 453 and 467. I do not know what will cure that.

Mr. Wright: I think if we had a brief recess, we could pick these off the title and supply them. I hesitate to take the Court's time—

Judge Hand: All right, we will take a short recess.

(Short recess.)

Mr. Shears: Will you mark these 419-A and 419-B for identification.

(Marked Government's Exhibits 419-A and 419-B for identification.)

Mr. Shears: They are subject to another exhibit which I am now offering. Yesterday your Honors will recall that I had marked for identification a num-

Colloquy

ber of price discrimination and clearance discrimination—

(3345)

Mr. Proskauer: A number of what?

Mr. Shears: Schedules of price discrimination and clearance discrimination; and I offered at that time to make any corrections which defendants saw fit to suggest. Only two defendants have done so, and they have stipulated as to those documents.

I shall now offer Exhibit 419 for identification and 419-A and B.

Mr. Davis: Tell us what it is, will you?

Mr. Shears: 419 consists of three sheets of Radio Keith-Orpheum Corporation, and 419-A is a national gross percentage contract with Theatre Service Corporation, dated June 1, 1944. 419-B for identification—

Judge Bright: What is 419-A, did you say?

Mr. Shears: It is a contract between the Radio Keith-Orpheum Pictures Corporation and the Theatre Service Corporation, dated June 1, 1944, relating to a percentage of national gross on 114 theatres.

Mr. Proskauer: Is that the one in Louisiana?

Mr. Shears: Yes.

Mr. Proskauer: That is an independent circuit.

Mr. Shears: We contend it is not an independent circuit: E. B. Richards purchases for both that and Paramount theatres—

Mr. Proskauer: Your Honor, that is where we go overboard. Mr. Richards—

(3346)

Mr. Shears: Just a moment. May I furnish this, and then you may speak?

Mr. Proskauer: Surely.

Judge Bright: We have a copy here of so-called 419-A.

Mr. Shears: Yes.

Colloquy

Judge Bright: Now, what is this 419-A?

Mr. Shears: A and B are contracts which are referred to on pages 2 and 3 of the exhibit which you have a copy of there. I do not have copies of 419-A and B, but they are explanatory of the exhibits which you have on pages 2 and 3. These are offered—

Judge Hand: Here we have 418, 420—

Mr. Shears: Those are subsequent offers.

Judge Hand: (Continuing) —423 and 419.

Mr. Shears: 419 is all I am offering at this time. 419 are the first three pages that you have in your hand.

Judge Hand: Yes.

Mr. Shears: And A and B are supporting contracts.

Judge Hand: I see.

Mr. Shears: This is offered, and I understand it is without objection on the part of Radio-Keith-Orpheum Corporation. And I also offer a stipulation at the same time.

(3347)

Mr. Proskauer: May I see it, please?

(Handed to Mr. Proskauer.)

Mr. Proskauer: In so far as this concerns Warner Bros. this schedule shows that a picture was leased to us for two days at 35 per cent; it was leased to Apex, independent theatre, for 40 per cent to 12,000 gross, and that is what is shown on the main exhibit. The stipulation shows the final adjusted contract terms to the Apex Theatre in Washington and the Bailey Theatre in New York; that the Washington contract was reduced to 35 per cent of the gross; so that Apex for two days, including a Sunday, paid 35 per cent, and the two Warner theatres paid 35 per cent.

Colloquy

Mr. Shears: And the Apex played after the Warner theatres.

Mr. Raftery: What picture is that?

Mr. Shears: Lady Takes a Chance.

Will you mark this 419-C for identification?

Mr. Proskauer: In order that this may all be in the record, the evidence already in will show that for their two days the Warner theatres paid very much more in dollars.

Mr. Shears: They should, getting first-run over the other theatre.

(3348)

Mr. Proskauer: You got the Sunday.

Mr. Shears: By requirement, while the others were optional.

Judge Hand: Now we have admitted all these intervening exhibits here by numbers, 453 to 466 inclusive.

(Government's Exhibits 453 to 466 for identification, inclusive, received in evidence.)

Mr. Shears: Now, do I understand that 419 is now admitted in evidence?

Judge Hand: Yes.

(Government's Exhibits 419, 419-A, 419-B and 419-C for identification received in evidence.)

Mr. Shears: And I now offer Exhibit 423 for identification in evidence, which is a similar schedule on the part of Warner Bros. Pictures Inc., and attached thereto are data with regard to their theatres indicated on this schedule supplied by the defendant.

Mr. Proskauer: May I see which one you are offering?

Colloquy

(Exhibit handed to Mr. Proskauer.)

(Mr. Shears confers with Mr. Proskauer.)

Mr. Proskauer: You better correct your statement on the record.

Mr. Shears: The data supplied by the defendant as to certain theatres in New Orleans and vicinity to
(3349)

which they sold pictures—

Mr. Proskauer: Your Honors, would it help if I called attention to this? We have corrected a schedule which they tendered us, and agreed on this, and I think it would be helpful if you would let me very briefly point out what the correction involves.

Mr. Shears: Just a moment, sir.

Mr. Proskauer: Pardon me?

Mr. Shears: Is this subject to stipulation, or are you going to argue?

Mr. Proskauer: I have stated to the Court that I am consenting to the admission pursuant to stipulation. I am not accustomed to withdrawing from my stipulations.

Mr. Shears: Then I submit to the Court there is no need for an explanation of what the corrections were; it only wastes the time of the Court.

Judge Hand: I do not know whether it is a waste of time or not. He said it would be brief.

Mr. Proskauer: By brief, I mean three minutes.

We leased, as this stipulation shows, pictures to a concern called the United Theatres which operated down in Louisiana. They owned about 20 theatres, and we had a general contract with them that they were to pay us 15 per cent of the box office on our pictures in all their theatres. We made that deal with them generally. United Theatres is an independent, un-

Colloquy

(3350)

affiliated corporation, and the discrepancy here which is shown, de minimis, as will surely appear to your Honors when you look at this, is due to the fact that we had this general agreement with this independent exhibitor for an overall 15 per cent in all their theatres.

Mr. Shears: May I answer that just by one brief statement? In Exhibit 419-A the Theatre Service Corporation buys for 114 theatres, and in the record on page 754 Mr. Rodgers said that E. V. Richards did the purchasing for Theatre Service and United Theatres.

Mr. Proskauer: What?

Judge Hand: Mr. Rodgers said that E. V. Richards did the purchasing for United Theatres.

Mr. Shears: And Theatre Service. Page 754.

Mr. Proskauer: Mr. Richards owned an independent circuit. He also had in some city a Paramount theatre—he was a Paramount partner. That does not make the circuit in which Paramount had no interest whatever an affiliated circuit.

Mr. Shears: We do not claim it is affiliated. We claim Mr. Richards buys not only for his own chain but for the Theatre Service chain, which is indicated on this.

Mr. Proskauer: But he did not buy from us for the other chain. He bought for his independent circuit.

(3351)

Mr. Shears: I pass up to the Court the list of theatres for which Mr. Richards purchased, which is shown in Exhibit 419-A and Exhibit 419-B, purchased on the same dates from RKO and now in evidence.

Colloquy

Judge Bright: Mr. Shears, while you are on these exhibits, what do you say that Exhibit 419 shows?

Mr. Shears: 419 shows that on the same date Paramount Richards, which is E. V. Richards, and Theatre Service purchased from RKO on the same national gross deal for all the theatres shown on those sheets—and these include all the theatres on the present exhibit—

Judge Bright: I thought you said you were offering Exhibits showing discriminatory practices.

Mr. Shears: Those are in support of the exhibits.

Judge Bright: Now, are you talking about the same exhibit I am?

Mr. Shears: 419.

Judge Bright: Tell me again what you are offering this to show.

Mr. Shears: 419, and subsequent exhibits which I am about to offer—

Judge Bright: No. 419 I am talking about.

Mr. Shears: (Continuing) —show a discrimination in price and in some cases in clearance between theatres which are neither affiliated or where they are in a big circuit, or as in this present case, pur-

(3352)

chased by E. V. Richards, who is a Paramount official, between those groups of theatres and the independents has nothing to do with the company to which we sold, shown on that exhibit.

Mr. Proskauer: May I say there is not a scintilla of evidence that Richards is a Paramount official. There is evidence that in a separate company, which has nothing to do with the company to which we sold, he has some interest with Paramount; and if what my friend is saying, that it shows we sold for a lower percentage to a circuit, wholly unaffiliated, which had a large number of theatres,—we did sell for 15 per

Colloquy

cent overall to such a circuit, which was wholly unaffiliated. That is the fact. Now, you can argue anything you want from it.

Mr. Shears: We can submit that in our briefs; but the evidence is clear in the record at the present time that E. V. Richards purchased for United Theatres and for Theatre Service, which are the two in issue at this point.

Mr. Proskauer: I do not see that that differs from what I said. All I said was that he purchased from us, at least this one circuit purchased from us and not the others.

Mr. Shears: The record is also clear that E. V. Richards is an official of the Paramount Company by virtue of the fact that they submitted an affidavit of

(3353)

his as the New Orleans representative for Paramount Company.

Mr. Proskauer: What do you mean by New Orleans representative?

Mr. Seymour: Now, I have sat quietly here—

Mr. Shears: He is a director. I will amend my statement.

Mr. Seymour: Mr. Richards is an officer of a company in which Paramount is interested in New Orleans. The Theatre Service Corporation which has been referred to is a company in which Paramount has no interest. Mr. Richards has an interest in that company.

Mr. Proskauer: The same is true of United Theatres. Paramount has no interest in that?

Mr. Seymour: Yes.

Judge Hand: What has this large independent circuit to do with this? Is your allegation of preferential treatment based on the fact that that was large

Colloquy

and got better treatment than some small people? What is it based on?

Mr. Shears: Our argument is based on the fact that Mr. Richards, who is the head of this organization, being affiliated with Paramount, obviously got a better deal than the independents did in that area, as shown by the figures on these charts.

Judge Bright: What figures? That is what I want you to show. Point out what you are driving at

(3354)

so we will understand it. Take 419, which is what I am talking about.

Mr. Shears: Yes. We were on the subject of the admission of the Warner documents. 419 is a blind deal, because in that case Theatre Service, Paramount-Richards purchased on a 00 301 percent of the national gross of all theatres using that picture, not only their own, but all theatres in the United States.

Mr. Proskauer: I don't like to interrupt, but you are mixing up RKO with Warner. There is no such thing on the Warner sheet at all.

Mr. Shears: I was asked about RKO by his Honor.

Judge Bright: I am only talking about 419. That is the RKO sheet.

Mr. Proskauer: Oh.

Mr. Shears: Counsel has been talking about one case and I have been talking about the other.

Judge Hand: This independent circuit, or this circuit that has been characterized, at least, as independent by Judge Proskauer—is that a circuit of Richards?

Mr. Shears: Theatre Service is composed of Richards' children, and Richards himself does the buying for Theatre Service, Paramount Richards and United Theatres. Now, that is all in the record.

Colloquy

(3355) Judge Hand: That is the independent circuit you referred to?

Mr. Shears: We do not characterize it as independent.

Judge Hand: All right. That is the circuit you referred to?

Mr. Shears: Yes.

Judge Bright: The only reason you say Theatre Service is not independent is because Richards buys for it? Have any of the defendants any interest in Theatre Service circuit as such?

Mr. Shears: They have not.

Judge Bright: But Richards buys for that and what other?

Mr. Shears: And for his own, Paramount Richards, in which they do have an interest; and you will see from these Exhibits 419-A and B, which I just passed up, the deal was made on identically the same day and identically the same terms.

Judge Hand: What interest had defendants in having Richards make favorable terms for some theatre circuit in which he and his children, or he or his children were interested and they were not interested, or do you claim there is an inference that they were interested? I do not know what your claim is about this independent circuit.

(3355A) Mr. Shears: We make no claim as far as United Theatres and Theatre Service are concerned, that any defendant has any interest whatsoever in those companies.

Mr. Proskauer: Those are two different companies, if your Honor please.

Colloquy

Judge Hand: Then what has it got to do with the case?

(3356)

Mr. Shears: Except that Paramount-Richards, in which Paramount does have a 50 per cent interest, as well as those companies do their booking through Mr. E. B. Richards who is a director of the Paramount Company.

Judge Goddard: Do you claim that he and his family got better clearance because of that; is that it?

Mr. Shears: The evidence shows that on these exhibits, yes, sir.

Judge Goddard: That is the purpose of it, isn't it?

Mr. Shears: That is the purpose of the exhibit.

Judge Bright: Now, does the evidence show that the Dreamland Theatre, for instance, which is given this 00301 rate pay more or less than the New Orleans Peacock which is listed at 35 per cent gross?

Mr. Shears: As I say, the national gross is a blind deal. There is no way for us to obtain that information. However, on the next exhibit—

Judge Bright: What we are interested in is this: You say it is discrimination.

Mr. Shears: Yes.

Judge Bright: Was he given a better deal than the other theatre was? And that would depend upon what he had to pay, wouldn't it?

(3357)

Mr. Shears: We would say yes.

Judge Bright: Does the evidence show that 35 per cent of the gross is more or less than 00301 of the national gross?

Mr. Shears: We will have to reduce that in our briefs. I could not reduce such a tremendous problem at this time, but we will do so.

Colloquy

Judge Bright: What do you say about it? You must have something to say about it. Is it more or less?

Mr. Shears: We say it is less.

Now, in the Warner Bros. exhibit, which is No. 423, it is evident from the face of the document that the same theatres about which we have been talking, the rate was 15 per cent as opposed to 35 and 40 per cent for the independents. Now, there is no question in this document about the discrimination; and, obviously, if E. V. Richards purchased for both United Theatres and Theatres Service and Paramount-Richards, on identically the same terms, it must be that the percentage national gross deal is a better deal, in as much as it is with Warner Bros. That is page 4 of the document that you have in front of you, the Warner Bros. Exhibit.

Mr. Proskauer: May I make perfectly clear to your Honors that what this exhibit shows was that we were selling a specific two films to Peacock, New

(3358) Orleans, and also we were selling these two independent circuits, United Theatres and Theatres Service Company on a large over-all deal of 15 per cent of their gross in all theatres. Now, you can argue until you are blue in the face as to which was the better or which was the worse deal. We were not discriminating against Peacock because it was an independent. We had a general deal with two other independent circuits owning some 20 or 30 or 40 theatres—I do not know how many exactly—selling them—

Mr. Shears: I will give you that number if you wish. 114 for Theatres Service and 57 for Paramount-Richards.

Mr. Proskauer: All right, that is all the better. We made a deal with two theatres—I understand

Colloquy

that is not strictly correct, but it is sufficient for my purpose to say that we had a general contract with these two independent circuits to license pictures to them on a straight 15 per cent basis for this large number of theatres. How that is discriminating against an independent, I don't know. They were themselves an independent circuit, both of them.

Mr. Shears: I will not labor the point. The 15 per cent is, of course, the theatre gross. The 35 and 40 per cent are of the theatre gross in each case.

(3359)

Mr. Proskauer: I made one inadvertent statement. The 15 per cent was for United Theatres. To Theatres Service we sold on a flat basis.

Judge Hand: Now, what is the situation, Mr. Wright?

Mr. Wright: I would like to get through, if I possibly can, with the offer of the remaining exhibits here tonight.

Judge Hand: Now, these have been marked for identification.

Mr. Shears: 419 and 420 are in by stipulation. As to the balance—

Judge Hand: All right, they are admitted. Now, go ahead, Mr. Wright.

Mr. Shears: As to 418, 417, 416, 422, 420 and 421, I have received no stipulation—

Mr. Seymour: I understood from counsel yesterday that he was giving us those schedules, and that he was going to offer them today, and at that time we would comment on them. When he is ready to offer the schedules which concern Paramount, I am ready to comment on them; and subject to some stipulations I want to make, and we will make progress. So why don't you go ahead?

Colloquy

Mr. Shears: I asked counsel yesterday to correct these documents and I received no correction.

(3360)

Mr. Raftery: He gave me two of them, and I am ready to stipulate on what terms I will consent to their going in. You offer them.

Mr. Seymour: Why don't you offer your schedule?

Mr. Shears: I withdraw the offer as to those which we have been unable to agree about, in order to save the Court's time.

Judge Hand: All right.

Mr. Shears: As a matter of fact, in each one we did not receive the data required to build up the document. The only two we have received complete are RKO and Warner Bros.

Mr. Seymour: In other words, you are not going to offer any against Paramount, is that right?

Mr. Raftery: I regret he is not offering the one on Universal.

Mr. Seymour: I regret he is not offering the one against Paramount.

Now, do you withdraw the Paramount schedule, Mr. Shears? Is that the point?

Mr. Wright: We withdraw the offers. If they want to offer them they can offer them. We want to get to material about which there cannot be any question.

Judge Hand: All right.

(3361) Mr. Wright: Now I will ask to have marked for

identification the supplemental schedule that the Court asked us to prepare to go with Exhibit 428, and I will ask to have it marked as 428-A, showing the exact splits of pictures in each of the situations—

Mr. Proskauer: Is this our old friend—

Colloquy

Mr. Wright: This is what Mr. Raftery refers to as the bouncing exhibit.

Mr. Proskauer: Now, what have you done to make it stop bouncing?

Mr. Caskey: Have you a copy?

Mr. Wright: No.

Mr. Proskauer: Mr. Wright; it is utterly unintelligible when you look at it. I do not know what it means.

Mr. Wright: Maybe I can make it clear to you.

Mr. Proskauer: I hope you can.

(3362)

The 428-A that you have there shows in each situation covered by 428 the number of features listed on the respective admissions of fact in evidence in the case which played affiliated and independent theatres wherever there was a division. Where there was no division, the notation simply gives the number or the word "or" as it was reported in the admission. Where there is a split reported, the precise split is indicated on this exhibit.

Judge Bright: May I ask you, Mr. Wright, to take the first line "New York, N. Y."

Mr. Wright: Yes.

Judge Bright: Warner 16. That means 16 pictures?

Mr. Wright: The numbers in each case refer to feature pictures, yes.

Judge Bright: Then in the next one, in the Fox column, that would be 15 of Fox pictures?

Mr. Wright: 15 Fox pictures.

Judge Bright: Three of the Loew Pictures?

Mr. Wright: No, I beg your pardon. The features in the Fox column are all features released by Fox; 15 of them had their first-run in New York City in

Colloquy

Fox theatres, three in Loew theatres, nine in independent theatres first-run New York City.

(3363) Mr. Proskauer: As I understand it, if you will let

me ask, Mr. Wright, the first column, Warner Bros. showed all fifteen of their features in their theatres.

Mr. Wright: First-run New York City, that is correct; and in Chicago, Warner showed 16 in Paramount theatres there, one in an independent theatre, that is, one Warner feature was shown by an independent first-run in Chicago, 16 by the Paramount affiliate, Balaban & Katz.

Judge Bright: You offer the exhibit with the amendments?

Mr. Wright: Yes, 428 and 428-A.

Mr. Caskey: If your Honors please, I think as far as Fox is concerned, the vices which we pointed out have been corrected, but certainly there is no need, I think, for 428 to go in with all of the various mistakes that we pointed out.

Judge Hand: We will overrule you on that. We have been arguing about this thing for—

Mr. Caskey: Many hours.

Judge Hand: —nearly two days, and it will have to go in subject to such comments as you may make in your briefs and argument.

Mr. Proskauer: They will be very unpleasant comments, your Honor.

Judge Hand: I have no doubt of it.

Mr. Seymour: One problem about it, if your Honors please, is this, we have had no time to check this at all.

Judge Hand: It is subject to correction. I imagine you will get together and do that, if there is anything to correct.

Colloquy

Mr. Seymour: If there are any corrections, we will notify the Government, and if those corrections are not made, we would like an opportunity to clip to this exhibit, so that they will be readily available, the corrections which we maintain the evidence requires.

Mr. Wright: Entirely agreeable.

Mr. Davis: Have you another copy of that?

Mr. Wright: No, we have just had one run on the typewriter.

Judge Bright: Mr. Wright, he may have my copy, if he wants it. Give it to Mr. Davis.

Mr. Wright: We will supply copies.

(Marked Government's Exhibits 428 and 428-A in evidence.)

Mr. Wright: We will ask to substitute a photostat of Exhibit 384 for the one which is in evidence, and return the original to whoever supplied it. The original was an exhibit in another case and so we have had to return the originals.

(3365) And I will ask to have marked as Exhibit 470 for

identification a franchise, a two-year deal, for the 1943-44, 1944-45 seasons, for Universal Pictures in the Kincey circuit, a Paramount affiliate. I offer this for purposes of comparison with the form of two-year deal that was offered by Universal in its case as being made with independents.

Judge Bright: Marking it for identification, you said?

Mr. Wright: Yes—well, I am now offering it.

Mr. Seymour: May I see it?

(Marked Government's Exhibit 470 for identification.)

Colloquy

Mr. Wright: Mark this as 471 for identification.

(Marked Government's Exhibit 471 for identification.)

Mr. Wright: Is there any objection to 470?

(No response.)

(Government's Exhibit 470 for identification received in evidence.)

Mr. Wright: And I will offer an agreement, a current franchise, for the 1944-45 and 1945-46 seasons for the exhibition of Columbia pictures in the Loew metropolitan circuit, which has been marked for identification as Exhibit 471.

(Marked Government's Exhibit 472 for identification.)

Mr. Davis: No objection.

Mr. Frohlich: No objection.

(3366)

(Government's Exhibit 471 for identification received in evidence.)

Mr. Wright: And I will offer Exhibit 472 for identification, which is a two-year deal covering the 1943-44 and 1944-45 seasons for exhibition of Columbia pictures in the Fox Intermountain Circuit.

Mr. Caskey: Where did you get it.

Mr. Wright: I think we got that from Columbia. Mark that 473.

(Marked Government's Exhibit 473 for identification.)

Mr. Caskey: Do you know this, Mr. Frohlich?

Mr. Frohlich: That is accurate. No objection.

Colloquy

(Gov. Ex. 472 for identification received in evidence.)

Mr. Wright: And I will offer in evidence a two-year franchise deal for Universal pictures to be exhibited in the RKO metropolitan New York circuit, which has been marked for identification as 473.

Mr. Raftery: Does this come from uptown, Mr. Wright?

Mr. Wright: I believe it did.

Mr. Raftery: I mean, who supplied it? Mr. Leisure says RKO supplied it. If they say it is O.K., it is O.K. with me.

(Government's Exhibit 473 for identification received in evidence.)

(Government's Exhibit 474 marked for identification.)

Mr. Wright: I offer 474 for identification, at this time.

(3366a)

Mr. Proskauer: May I see it, please?

(Handed to Mr. Proskauer.)

Mr. Proskauer: In so far as this concerns Warner Bros., this schedule shows that a picture was leased to us for two days at 35 per cent; it was leased to Apex, independent theatre, for 40 per cent to \$12,000 gross, and that is what was shown on the

(3367)

agreement between Paramount Pictures, Inc., and Partmar Corporation, relating to the exhibition of Paramount pictures in the Paramount theatre in Los Angeles, covering a ten-year period from 1939 through 1949. That I take it, is received.

(Government's Exhibit 474 for identification received in evidence.)

Colloquy

Mr. Wright: I have here, if the Court please, a three-year agreement covering the 1939-40, 1940-41 and 1941-42 seasons for the exhibition of Universal pictures in the so-called Sparks Circuit in Florida. I will offer the entire agreement if any one else wants the entire agreement in. All I am interested in is this one provision which I will read into the record, if that procedure is agreeable to the other parties.

Mr. Proskauer: I can't tell you whether it is agreeable because I never saw it and I don't know what it is.

Mr. Wright: This agreement, as I say, covers a three-year period for the exhibition of Universal films in the towns in the Sparks Circuit. The number of towns covered are those which comprise the circuit and are, I believe, about forty or fifty in number. I don't think the exact number is material for our purposes.

The provision I want to call attention to is this:

"If desired, one additional run will be granted

(3368)

in the following towns without additional charge:

"De Land, Orlando, Fort Lauderdale, Sarasota, Gainesville and St. Augustine."

Mr. Proskauer: Is it a percentage contract?

Mr. Wright: The terms of the contract are simply rental of \$31,909 per year. "Such film to be exhibited in the town and according to the runs designated upon the attached sheet, Exhibit B, made a part of the contract."

And then there is a further provision that Sparks Circuit, Inc., "may have the right to exhibit any picture included in this contract in any theatre operated by it in the town of Palm Beach, Florida, and that the rental of such film shall be \$100." And then "it is

Colloquy

further agreed that any runs set forth in this agreement shall carry a rental price of \$25. per run."

Mr. Raftery: You only want incorporated that Sparks got a free run in those towns, if he wanted it?

Mr. Wright: He was given an optional free run in the towns of De Land, Orlando, Fort Lauderdale, Sarasota, Gainesville and St. Augustine.

Mr. Raftery: How many towns are there altogether?

Mr. Wright: There are—

Mr. Raftery: I mean, the free run?

Mr. Wright: There are six towns.

(3369)

Mr. Raftery: I don't care whether he puts the contract in or puts the provision in, as far as Universal is concerned.

Judge Bright: Is the Sparks Circuit an independent circuit?

Mr. Wright: No, that is one in which Paramount, I believe, owns approximately 90 per cent interest.

Mr. Frohlich: That is the one, your Honors will recall, where Columbia gave the franchise agreement to Sparks and it was proven that out of the 43 cities Mr. Sparks owns all the theatres in 32 cities. There isn't another theatre in any of those 32 cities but the Sparks theatres.

Mr. Raftery: That is the one Scully testified that Rogers was a tough buyer.

Mr. Wright: There isn't any dispute about that.

Judge Bright: About the testimony about the fact that he is a tough buyer?

Mr. Raftery: Either way.

Mr. Wright: That he is a tough buyer. I don't remember the other part of it. Then I have here a franchise agreement from RKO Radio—I have another exhibit that I simply want to call attention to the facts about, without making an offer unless some-

Colloquy

one wants it in the record. It is a franchise from RKO Radio Pictures, Inc. to Junior-Orpheum Corporation, San Francisco, Limited, dated September 1, 1941, but actually executed November 19, 1941, between those parties covering the exhibition of RKO films in the town of San Francisco for a ten-year period, commencing September 1, 1941, and ending August 31, 1951. I merely offer the statement of that fact to show that RKO has made franchises for RKO pictures since the consent decree was entered.

(3370)

Mr. Leisure: We have no objection to it as long as the record shows that the theatres are our own subsidiaries.

Mr. Wright: I have here also a contract between Universal and Skouras Theatres Corporation covering the seasons 1944-45, 1945-46, and 1946-47, which relates to a number of theatres operated by Skouras in metropolitan New York. The provision I want to call attention to is simply one which appears in the clearance schedule for each of the, I believe, thirty or forty odd theatres, altogether. This appears at the bottom of each page on which the theatres are scheduled. "Skouras theatres to have seven-day clearance on any new or newly operating theatres within the area of the furthest point over which any Skouras theatre is accorded clearance."

Mr. Raftery: The only objection we have to that is that Skouras is not a party to this action in any

(3371)

respect. It is a dealing with an exhibitor not a party to it and you are not going to offer the whole thing?

Mr. Wright: If you want the whole thing in, I will put it in.

Mr. Raftery: I don't want anything in.

Colloquy

Mr. Wright: Otherwise I will offer the provision. If the Court please, I believe we actually have somewhere here a provision as to the existence of a fact. Have you got a copy of our stipulation, Mr. Frohlich?

Mr. Frohlich: I haven't, but I have no objection to your reading it or putting it in the record.

Mr. Wright: If I can find it, I will put it in. The stipulation executed between Mr. Frohlich and myself is as follows:

"It is hereby stipulated between counsel for the defendant Columbia Pictures Corporation and the plaintiff that Columbia now serves its feature films to two neighborhood houses in New Orleans, Louisiana, to-wit, the Beacon and Lakeview theatres which are located within two blocks of each other, with sixty days' clearance in favor of the Beacon over the Lakeview, and has maintained that clearance from the opening of the Beacon in 1941 to the present time."

(3372) That, the Court will recall, is one of the situations where the appeal board cut a similar clearance in favor, or, used by other defendants, to one day in 1943.

Mr. Frohlich: And Columbia was never a party to any clearance controversy.

Mr. Wright: That is quite correct. As far as the decree is concerned, Columbia did not sign it.

I had a similar stipulation, or a stipulation in somewhat different form regarding the same theatres with United Artists, I believe, which I also appear to have—

Mr. Rastery: I am ready to stipulate on this not in that form.

Mr. Wright: Yes, I understand that. You have a copy then?

Colloquy

Mr. Raftery: No, I haven't a copy. I will read into the record what I am willing to stipulate. You may take it or leave it.

Mr. Wright: All right, why don't you do that?

Mr. Raftery: With the exception of two pictures, Stage Door Canteen and Johnny Come Lately, both of which played Mrs. Smith's theatre—what is the name of her—

Mr. Wright: The Lakeview.

Mr. Raftery: (Continuing) The Lakeview first-run in that zone, all of our pictures have been made available to Mrs. Smith for booking, I mean all the pictures she has licensed have been made available

(3373)

to her for booking sixty days after their play date at the other theatre.

Mr. Wright: The Beacon.

Mr. Raftery: The play-off shows on the 1943-44 product that she has played these pictures: the earliest one of 13 she played three months after availability, the last one, the outside date, is eight months after availability. All the other pictures vary from three months to eight months.

On the 1944-45 season, there were 13 pictures involved, the earliest one she played 43 days after availability, the longest eight months after availability, and the same sixty-day availability prevailed.

Mr. Caskey: Availability means the time when she had a right—

Mr. Raftery: When she had a right to play it. And the other eleven pictures vary from two months to eight months after availability.

Mr. Wright: It is a fact, is it not, Mr. Raftery, that in her contracts all that is said as to clearance is simply "after Beacon"?

Colloquy

Mr. Raftery: That is right.

Mr. Wright: Sixty days after Beacon.

Mr. Raftery: No, there is nothing in the contract. He asked me to find the fact.

Mr. Wright: The fact is the contract simply says
(3374)

"after Beacon" but the practice is to make her wait at least sixty days.

Mr. Raftery: And also, the top price she paid for any one of these features with the exception of the two she played clear, was \$15.

Judge Bright: Would she be given notice of availability of those pictures after the expiration of sixty days?

Mr. Raftery: That is right.

Judge Bright: Right immediately after?

Mr. Caskey: Before.

Mr. Raftery: In sixty days they are available to her.

Judge Bright: When is she given notice of availability?

Mr. Raftery: As soon as we set a booking in the other theatre. You set the booking in the theatre. That is a question that Judge Goddard was asking about during the examination of one of the witnesses. In your contract you have a provision that requires the distributor to give a written notice of availability as soon as the picture is available. Then it is her option to date the picture. She is the one that dates it and she has a period within which to date. Notwithstanding the fact that these pictures were made available on the sixtieth day after the finish of the

(3375)

run at the other theatre, her booking sheets on the play-off shows we waited as long as three months to

Colloquy

get the big sum of \$15 in this situation. The other two pictures she played clear of the Beacon because we had a fight with Mershon and did not sell him the picture in any part of his United Theatres.

Mr. Caskey: I don't think you have answered Judge Bright's question as to when notice of availability was sent to her.

Mr. Raftery: It was sent to her as soon as you set your booking date in the first theatre.

Judge Bright: That does not mean a thing to me. When do you set the booking date in the first theatre?

Mr. Raftery: In the first theatre, that depends on the first run in your theatre. You have a first-run in New Orleans. That picture plays downtown—most of our pictures up until this year played downtown in the Loew theatre. As soon as you set your first-run, then you set your availability for the second run. Now we will assume this Peacock theatre was the second run. As soon as you set your date on that one, you immediately set your date on your third run. That is the date of availability. Then the exhibitor comes into the exchange, goes to the booker and sits down and works out her dates on the pictures she wants to book. She had all these availabilities sixty

(3376)

days after the other one, and she set them as far back as eight months after they could have been played. That is the way they book them.

Mr. Caskey: She got the notice sixty days before she could have played the picture.

Mr. Raftery: Right.

Judge Bright: When you say they play clear you mean that is without any clearance?

Mr. Raftery: No, the other theatre did not play the picture at all. Stage Door Canteen—

Colloquy

Judge Bright: She could play it first-run?

Mr. Raftery: She played it first run in both instances—exclusive run in that competitive area.

Mr. Wright: Now I am informed that Mr. Raftery is also willing to stipulate this schedule that was marked for identification as 417, as to the Stage Door Canteen in certain theatres in Kansas City, is that right?

Mr. Raftery: I was willing to stipulate that but I am awfully sorry about that Universal one. I don't want to stipulate the two of them. You had better ask Mr. Caskey about that. That is his stuff. I don't want to be stipulating for him, too.

Mr. Caskey: The Government cannot justify the statement on the front of this, that the Dickinson theatre played after the Waldo.

(3377)

Mr. Marcus: The Appeal Board decision indicates that.

Mr. Caskey: I am thoroughly familiar with that, sir, and the Appeal Board does not indicate any such thing. Of course if you want to put the contract in evidence, that is all right, but I certainly object to this prejudicial schedule, which is not like anything that is in evidence.

Mr. Wright: What do you want taken out of the schedule to satisfy you?

Mr. Caskey: Put in the contract and then make up your own schedule and we will make up one for our brief.

Mr. Wright: We will offer the folder identified as 417 with the contracts in evidence and without the schedule.

Mr. Caskey: There are some others than Kansas City in that folder.

Colloquy

Mr. Wright: Then they should be removed.

Mr. Raftery: What are the towns involved there?

Mr. Wright: The only town involved is Kansas City, Missouri. The theatres involved are the Fox, Waldo, the Rock Hill and the independent Dickinson and Bijou.

Mr. Raftery: Where is the Dickinson, in what town?

Mr. Wright: It is in, I believe, a suburb of Kansas City, called Mission, Kansas City.

(3377-A)

Judge Goddard: What is the date of the contract?

Mr. Wright: The date of the contract between United Artists and the Bijou is October 8, 1943; that between United Artists and Dickinson is July 19, 1943; the Fox contract with United Artists is Dated May 8th, 1945.

(Marked Government's Exhibit 417 in evidence.)

(3378)

Mr. Wright: We should also like to offer these two United Artists—well, they are actually two contracts dated September 20, 1944. This contract, dated September 20, 1944, relates to one picture but consists of three pages, all between United Artists and a group of exhibitor corporations affiliated with Paramount and Minnesota Amusement Company. I will ask to have that marked with the next exhibit number.

(Marked Government's Exhibit 475 for identification.)

Mr. Wright: And as 476 for identification two dated June 26, 1944, attached together, for exhibition of one picture in the Kincey Circuit, also affiliated with Paramount.

Colloquy

Mr. Raftery: Before I consent, could you tell us the purpose for offering anything like that?

Mr. Wright: These are recent agreements in which a profit-sharing deal was made between United Artists and these Paramount affiliates.

Mr. Raftery: Do you mean we have an interest in the operation of those theatres?

Mr. Wright: You do.

Mr. Raftery: Or was our film rental measured by house expenses? Is that what it means?

Mr. Wright: Yes.

Mr. Raftery: I object to the characterization of
(3379)

profit-sharing. I have no objection to it going in.

Judge Hand: There is a great tendency on the part of everybody except yourself to put in anything of which he has possession.

(Marked Government's Exhibits 475 and 476 in evidence.)

Mr. Wright: That tendency, if the Court please, we have now checked. We rest—I have one qualification, subject to the supplying of the schedule which was to be added to Exhibit 421 for identification in order that it might be received, and that, I think, they are working on upstairs.

Mr. Caskey: I withdraw my desire to see it.

Mr. Seymour: I have those remaining affidavits and things, if I may proceed for a couple of minutes and clean up that matter.

Judge Hand: All right. These exhibits that are marked here only for identification, I take it, have been offered in evidence, isn't that right?

Mr. Wright: Which exhibits are those?

Judge Bright: 474, 475 and 476.

Judge Hand: There were a number.

Austin C. Keough

Mr. Wright: They were all offered and received, I understood it.

Judge Hand: We intended to receive them. I
(3380) wanted to be sure they had been.

Judge Goddard: 417 too.

Mr. Seymour: First, Mr. Keough, who was a witness here is in the hospital, and there were certain corrections in his testimony that he wanted to have made, and that we have agreed with the Government should be made by stipulation, and I would like to have the stenographer copy those corrections into the record, so that reference can be made to that.

(The stipulation referred to is as follows:)

"IT IS HEREBY STIPULATED AND AGREED that if Austin C. Keough were recalled to the witness stand, he would testify as follows, in correction of the testimony heretofore given by him at the following pages of the typewritten record:

"1. At page 1263. In lieu of his answer reading 'Starting in about the year 1913, Paramount, * * *' he would testify 'Starting in about the year 1918, Paramount, * * *'.

"2. Also at page 1263. In lieu of the answer commencing 'There was a Big Four, which then consisted of a company called Vitagraph, and Selig, and Spoor, and Essanay', he would testify 'There was a Big Four, which then consisted of a company called Vitagraph, and Selig, and Lubin, and Essanay'.

"3. At page 1289. In lieu of the sentence in the answer commencing 'That is the form that

Austin C. Keough

Judge Thacher and the Supreme Court said was illegal to use by agreement', he would testify: 'This form, as later revised in 1926 and again revised after the Federal Trade Commission conference in 1927, is the form that Judge Thacher and the Supreme Court said was illegal to use by agreement'.

"4. At page 1295. In lieu of the answer commencing 'Now that contract, having been worked out by this Committee, * * * and ending the Federal Trade Commission conference—', he would testify: 'This 1928 contract, evolved from the Federal Trade Commission conference, was in use until a decision by Judge Thacher in October, 1929, and thereafter Paramount used its own form of contract until about 1934'.

"In April of 1930, representatives of distributors and exhibitors met at Atlantic City to evolve another uniform contract. They did evolve a contract, and by the end of the year 1930 submitted it and recommended its adoption. It was used by some distributors and not by others. There was no

(3382)

agreement among any of the distributors as to its use. It is not the same agreement which Paramount used and which is marked "Exhibit P-10." It was referred to in the industry as the 5-5-5 contract and its use was optional, as were also the provisions therein for the arbitration of disputes'.

"5. At page 1296. In view of the foregoing clarification, Mr. Seymour's answer to Judge Bright's question at page 1296 should be changed to read as follows:

Austin C. Keough

'Judge Bright: The 5-5-5 contract is Exhibit P-10?

'Mr. Seymour: No, Exhibit P-10 is Paramount's own form of contract. The 5-5-5 contract was similar to the one marked P-11'.

"6. At page 1297. In lieu of the answer commencing 'It was a shorthand description of the Committee that was made up * * *', Mr. Keough would testify: 'It was a shorthand description of the Committee that was made up. There were 5 men representing Allied States Exhibitors' Asso-

(3383) ciation, 5 representing motion picture theatre owners of America, who were both independent exhibitors' organizations, and 5 who represented distributors of the affiliated exhibitors.'

"7. At page 1317. In lieu of the sentence in the answer which commences 'In other words, Paramount agrees that this first run account of its choice * * *', Mr. Keough would testify as follows: 'In other words, Paramount thereby agrees that this first run account of its choice, to whom it has granted the license, that Paramount, in licensing that same picture to be exhibited on a subsequent run in competing theatres whose admission prices are equal to or lower than the minimum stated in the clearance provision of the license agreement, will not so license that picture as to permit its exhibition until after the expiration of the stated period of clearance.'

"8. Also at page 1317. In lieu of his answer to the question by Mr. Proskauer, Mr. Keough would testify: 'Won't license it for exhibition within 30 days, within the 30 days stipulated clear-

E. C. Beatty

ance, in a theatre which charges less than whatever the stated price is in that particular contract."

(3384)

Mr. Seymour: Second, Mr. Beatty, who was a witness for Paramount, called by Paramount, has made an affidavit as to testimony which he would have given if recalled, and I understand that the Government stipulates that the testimony would be given in accordance with this affidavit, if recalled, with the same force and effect as if he were here, and I ask that that be copied into the record.

Mr. Wright: There is one qualification I wish to make as to this last stipulation. He is now offering an affidavit from the witness Beatty as to what the witness Beatty would say if now recalled to explain certain terms in a contract which was offered in evidence. Mr. Beatty has signed this affidavit and I accordingly agree that if called to the stand at this time he would say what he said in his affidavit. However, I would object at this stage to that testimony being received, even if he were here on the witness stand because he should have made the explanation that he now seeks to make at the time he was here.

Mr. Seymour: The only reason—

Judge Hand: We will overrule that. Go on.

Mr. Seymour: Very good. I would like to have that copied into the record.

(3385)

(The affidavit of E. C. BEATTY is as follows:)

"E. C. BEATTY, President of W. S. Butterfield Theatres, Inc. and Butterfield Michigan Theatres Company, being duly sworn, deposes and says,

E. C. Beatty

"I am informed by counsel for Paramount Pictures, Inc., that after I was called as a witness on behalf of that defendant and testified in connection with the proceedings in the United States District Court for the Southern District of New York in United States vs. Paramount, et al., counsel for the Government introduced in evidence a certain agreement between Walter S. Butterfield, Famous Players Lasky Corporation, Balaban & Katz Corporation, Publix Theatres Corporation, and B. F. Keith Corporation, dated September 24th, 1926, as Government's Exhibit number 387.

"I am further informed that Government counsel referred to paragraph 20 of said Agreement. This paragraph speaks for itself.

"If I had been interrogated by the Government counsel in regard to this Agreement, and particularly paragraph 20 thereof, when I was on the witness stand, I would have testified, and the fact is, that this paragraph of the Agreement was never carried out or performed by any party to the Agreement and that it has never been operative.

(3386)

The fact is W. S. Butterfield Theatres, Inc. was incorporated on the 24th day of December, 1926; that prior to that time there was no one in existence who could execute a contract for said W. S. Butterfield Theatres, Inc.; and I further state that after the 24th day of December, 1926, and up to the present time, no contract as set forth in the said paragraph 20 was ever entered into by W. S. Butterfield Theatres, Inc.; that neither Publix, Keith or any other organization or individual ever requested execution of such a contract; and I, together with all my associates with W. S. Butter-

E. C. Beatty

field Theatres, Inc., and so far as I know all interested in Keith or Publix took it for granted and acted on the theory that no such contract was or would be executed. And the fact is, further, that W. S. Butterfield Theatres, Inc. did not, after its incorporation, agree with Keith that Publix would act as agent in negotiations with Producers Releasing Corporation, nor did Publix Theatres Corporation negotiate film licenses for W. S. Butterfield Theatres, Inc., Butterfield Michigan Theatres Company, or any subsidiary of either of the said corporations.

"From the organization of the Butterfield corporations, and including the period during the lifetime of W. S. Butterfield, all negotiations for pic-

(3387)

tures purchased for exhibition purposes have been conducted and consummated by myself or those specially designated employees who referred for final action all such purchases to me. To the best of my recollection, I do not recall that W. S. Butterfield made any purchases or participated in any other way for pictures for exhibition purposes.

"To the best of my personal knowledge, neither Keith nor any successor of Keith ever demanded that the new company, W. S. Butterfield Theatres, Inc., contract for any pictures of Producers Distributing Corporation, never named a substitute therefor, and never demanded that it contract for the exhibition of any pictures whatsoever. However, I further state to my personal knowledge that practically all of the pictures of Producers Distributing Corporation, while it existed, and all leading Companies in the country, sold to and the Butterfield Corporations purchased substantially all their pictures.

Colloquy

"I further state that Mr. W. S. Butterfield died in the month of April, 1936, and immediately thereafter I became President and Treasurer, and performed all the duties of General Manager of the two aforementioned corporations.

"I further state that no officer, employee or representative of Publix Theatres Corporation or

(3388)

of Paramount Pictures, Inc. or any of its predecessors has ever participated in or been consulted in regard to any negotiations with any distributors in the licensing of films to the theatres operated by said corporations except that naturally officers, employees or representatives of Paramount Pictures, Inc. have participated with myself, or specially designated subordinates of mine, in the negotiations of licenses for the exhibition of Paramount pictures in theatres operated by those two corporations or any subsidiaries thereof.

(Sgd.) E. C. BEATTY."

Mr. Seymour: Now, to complete two groups of affidavits which I had offered, the first group being P-24, I offer as part of P-24 the affidavits of M. A. Lightman, William K. Jenkins and E. H. Rowley and ask to have those treated as part of P-24.

(Marked Defendant Paramount's Exhibit P-24-A.)

Mr. Seymour: Then I ask to have treated as part of P-25 the remaining affidavits in that category which I propose to have marked, an affidavit David R. Wallerstein, an affidavit of Clifford J. Shaw—several affidavits of Clifford J. Shaw—and an affidavit of Joseph Phillipson.

Colloquy

(3389) That completes the reserved right to put in additional affidavits, which your Honors were kind enough to grant me.

(Marked Defendant Paramount's Exhibit P-25-A.)

Mr. Wright: It raises, of course, the question of our motion to strike. We had the motion virtually completed but we haven't yet seen this last material. I haven't had a chance to include it. I suppose that our motion, if forwarded and included in the record after the close of the proceedings, would be taken to have the same force and effect as if filed now?

Judge Hand: Oh, yes.

Mr. Proskauer: Shall I proceed? I have a very short number of exhibits.

The first ones I offer, I state by way of explanation, relate to Government's Exhibit 403, which you will remember was the statement of our profit and loss for certain years.

I offer in evidence a condensed statement of the profit and loss of Warner Bros. for the fiscal years ending 1929 to 1944 inclusive, which are taken from our published reports.

Mr. Wright: Did you say condensed or consolidated?

Mr. Proskauer: I said condensed.

Mr. Wright: Is it a condensed consolidated statement?

(3390)

Mr. Proskauer: It is a statement of the profits of the corporation as shown in its annual reports, and it is by the books of account of the company.

I don't want to comment on this other than to call your Honors' attention to the fact that in 1929 our

Colloquy

profit was 14 million dollars, in 1932 our loss was 14 million dollars. There have been variables like that all through. The average, for the last three years, was a profit of just under eight million dollars and for the 13 years prior to that it was \$948,000.

(Marked Defendant Warner's Exhibit W-17.)

Mr. Proskauer: I offer in evidence a schedule showing the net profit in relation to our total income percentagewise during each of those years.

While it is being marked, I will call your Honors' attention to the fact that in 1929 we earned almost 20 per cent on our income.

Mr. Wright: May we have a copy of that?

Mr. Proskauer: The 16-year average was 2.19 per cent. The 13-year average from 1929 to 1941 was just under one per cent and the three-year percentage for the years 1942 to 1944 inclusive was 6.02 per cent.

(Marked Defendant Warner's Exhibits W-18 and W-19.)

(3391)

Mr. Proskauer: The next schedule I offer shows net profit in relation to net worth. That shows that in 1929 we made nearly 20 per cent on our net worth. In 1932 we lost 20 per cent on our net worth. For the 13 prewar years, 1929 to 1941, we earned 1.22 per cent on our net worth and for the three war years we earned 7.84 per cent.

(Marked Defendant Warner's Exhibit W-20.)

Mr. Proskauer: The next schedule shows the same computation with respect to our total assets.

Mr. Wright: We are going to get copies of these eventually, I take it?

Mr. Proskauer: Right now, I hope.

Colloquy

That shows for the three war years we averaged 4.33 per cent on our assets; that for the 13 years preceding that we averaged .53 per cent, and that for the 16 years prior to that, we averaged $1\frac{1}{4}$ per cent earning on our total assets.

(Marked Defendant Warner's Exhibit W-21.)

Mr. Proskauer: Your Honors will recall I cross-examined the Government witness on the box-office receipts as showing why the profits for the last three years had been so good. I offer in evidence a schedule showing the fluctuation in attendance and box-office receipts of motion picture theatres operated in the

(3392)

United States. By that, of course, I mean the Warner Bros. theatres. The heading is somewhat ambiguous.

It shows that in 1932 the attendance was 163,000,000 and the box-office receipts \$31,600,000; in 1944 the attendance increased to 218,000,000 and the box-office receipts increased to \$77,200,000. The 13-year average is 183,900,000 attendance and \$54,300,000 receipts. The 10-year average for the prewar years 1932 to 1941, inclusive, are 174,800,000 attendance and only \$49,300,000 box-office receipts, but for the three war years, the attendance went up to an average of 214,100,000, and the box-office receipts to an average of \$71,100,000.

(3393)

I offer in evidence a schedule taken from the Film Daily Year Book of 1945 page 47, showing the national average of United States theatre admission prices for motion picture theatres.

Mr. Wright: Now, just a minute: As far as we are concerned, these admission price fluctuation data I think are not relevant or material, but if we are

Colloquy

going to use such sources as Motion Picture Daily tabulation, we have an OPA study showing the rise in admission prices when they considered the question of applying ceilings. I submit if we get into that kind of a field there is better data than this—

Mr. Proskauer: If there is any question about it I will withdraw it. We will rest on our own admission prices. Counsel suggested at one stage here that we had not, as he said, passed on to the public economies, or that the huge increase in the cost of our film production had been passed on to the public. I will rest on my own figures on that if counsel objects to showing the national figures.

Mr. Wright: We do not object to showing the national figures.

Mr. Proskauer: Well, if you do not want to show them one way or the other, do not make arguments like that.

(3394)

Mr. Frohlich: If the Court please, I would like to have Mr. Wright—

Judge Hand: Wait a minute. You have got something more?

Mr. Proskauer: Yes. I have got an affidavit.

Mr. Frohlich: I am sorry.

Mr. Proskauer: This affidavit shows the actual minimum evening adult admission prices actually charged in the various theatres that played Princess O'Rourke. I understand that Mr. Wright is willing to stipulate that this affidavit may be used in lieu of calling Mr. Jones personally.

Mr. Wright: Yes, indeed, and that he would testify—

Mr. Proskauer: And it may be admitted and marked with the same force and effect as though it were his testimony if he were called as a witness.

Colloquy

(Marked Defendant Warner's Exhibit W-22.)

Mr. Proskauer: I now offer a schedule—and the source of it is this last affidavit which went in evidence—of the contract minimum admission prices and the actual minimum admission prices of exhibitions listed—these are exhibitions of Princess O'Rourke—listed in Government's interrogatories 6 to 11 in evidence and while it is being marked I will briefly call attention to this—

(3395)

Judge Hand: Wait a minute.

(Marked Defendant Warner Exhibit W-23.)

Mr. Proskauer: What the schedule shows is, when you get down to A and B, that in 395 cases the actual minimum admission prices were greater than contract minimum admission prices, and it lists how much more there were. Then it shows that in 57 cases the minimum admission price was less than the contract minimum price, and it shows how much—I mean the actual admission price was lower than the contract minimum. And we shall argue certain inferences from that in our brief.

I think that is all we have. We rest.

Mr. Davis: If the Court please, my contribution will be a very trifling one. In view of what has transpired this afternoon, I am not even sure that it is a necessary one. The Court will remember that the Government produced tabulations showing the distribution of license fees paid to all defendants in the cities of Atlanta, Philadelphia and Kansas City, showing the distribution of license fees between affiliated and non-affiliated theatres, first-runs and subsequent runs. I rather anticipated that on those three exhibits we should hear an argument from the Govern-

Colloquy

ment that they were typical in the situations throughout the country. Mr. Wright has now stipulated that that is not his purpose, and that that will not

(3396)

be the argument as to Atlanta, Kansas City, and Philadelphia.

To meet that argument, however, I have had prepared a schedule of 15 cities, including such cities as Baltimore, Cleveland, St. Louis, Washington, New York, Columbus, Ohio, and others, in which I have had shown the distribution of license fees paid to Loew's on the first-run, subsequent-runs and all the film rentals distributed between Loew's own theatres, theatres of co-defendants here, and the independents. And although, as I say, the concession of the Government has somewhat minimized my belief in the necessity of this, I nevertheless offer it; and having offered it, I gracefully retire.

(Marked Defendant Loew's Exhibit L-18.)

Mr. Caskey: Will you mark this for identification.

(Marked Defendant Fox Exhibit F-28 for identification.)

Mr. Caskey: I offer in evidence a chart showing the playoff of the picture Sweet Rosie O'Grady in St. Louis, Missouri.

♦ (Marked in evidence Fox Exhibit F-28.)

Mr. Caskey: It was made on the same basis as some charts that were offered by the Government for other cities.

I offer in evidence a similar chart for Indianapolis, Indiana.

Colloquy

(3397)

(Marked Defendant Fox's Exhibit F-29.)

Mr. Caskey: In the course of Mr. Kupper's testimony I stated that I was not examining him in detail as to the 92 cities, but would offer in evidence as an exhibit the detailed statement that was submitted to Mr. Wright prior to Mr. Kupper's leaving the stand; and we now have submitted to him the revised copy which contains wholly immaterial corrections.

Mr. Wright: I haven't the faintest idea as to whether these corrections made since he left the stand are material or not.

Mr. Caskey: I assure you they are not.

Mr. Wright: I submit this is an objectionable procedure.

Judge Hand: I hope we won't get into the old business of spending more time for days correcting minutes.

Mr. Caskey: You can see they are purely grammatical.

Mr. Wright: If you will just offer it with the changes made since he was on the stand indicated, I think the Court can then see and we can see what has been done.

Mr. Caskey: All right; stitch that right on the back, Mr. Clerk.

(3398) Mr. Proskauer: With the understanding if you

do not agree on it, you can go back and talk to the reporter.

(Marked Defendant Fox's Exhibit F-30.)

Mr. Caskey: We rest.

Mr. Leisure: We have three exhibits, if your Honor please: We have three exhibits which we have

Colloquy

already cleared with Mr. Wright. I think they can just be marked without comment. This is a schedule of income, of net profits of RKO. May we have that marked, please?

(Marked Defendant's RKO-Exhibit 26.)

Mr. Leisure: The second is a schedule of RKO film rentals received for typical pictures from affiliated and unaffiliated exhibitors in comparable size theatres.

(Marked Defendant RKO Exhibit 27.)

Mr. Leisure: And the third is a table supplementing material shown by the Government on its chart, Exhibit 432.

(Marked Defendant RKO Exhibit 28.)

Mr. Frohlich: I will be very brief. I have a simple request to make, with the permission of the Court, of Mr. Wright. There came into evidence this afternoon a contract between Columbia and Loew's, a franchise agreement. That had a provision in it under which Columbia made some allowance of house expenses. In view of Mr. Wright's statement that he would consider that a sharing of profits—and I did not bring any other contracts down with me—but I would like him to stipulate that I have such contracts

(3399)

of a similar nature with independents with identical clauses. I assure you that is a fact, and I want to do this in the interest of time.

Mr. Wright: I would like to see those contracts that are identical. I would concede that you may have contracts with independents in which your film rental is determined giving consideration to house expense, if that is what you have in mind.

Colloquy

Mr. Frohlich: Yes, I have those.

Mr. Wright: That stipulation we will give you, but that they are identical, we will not.

Mr. Frohlich: That will satisfy me. That is all.

Mr. Rattery: The Universal defendants rest. United Artists rests.

For the record I wish to make the same motions to dismiss I made at the close of the Government's case.

Mr. Frohlich: Columbia makes the same motions.

Mr. Seymour: I suppose there may be some virtue in renewing the motions to strike which the defendants made, and I should like to renew them and include within them, without taking the time to supply details, the various exhibits that have been offered since the defendants closed their case, the point being, of course, that we have taken the position throughout as to all these exhibits that exhibits affecting one de-

(3400)

fendant were not admissible against others, and they have never been connected until this time.

Judge Hand: Well, that will be denied.

Mr. Caskey: Denied as to all of them?

Judge Hand: Yes.

Mr. Proskauer: And may they all have the benefit of an exception?

Judge Hand: Yes. But the time is coming when you do not have to take it. I think it has come under the new rule. I do not know too much about the new rule. Hasn't it?

Judge Bright: Yes.

Judge Hand: Now, Mr. Wright, you want to put on the record motions to do all kinds of things, too?

Mr. Wright: That is correct, Judge.

Colloquy

Judge Hand: So as to show that you too have not been idle?

Mr. Wright: I cannot claim any activity in that connection myself, but one of my assistants has been laboring with that problem for a week.

Mr. Proskauer: Why not insert in the record any motion you want and let the Court deny it now?

Mr. Wright: That is agreeable.

Judge Hand: Is there anything more anybody wants to do except put in briefs and argue the case?

(3401)

Mr. Proskauer: That is all I want.

Judge Hand: Now when will you be ready with your brief, Mr. Wright?

Mr. Wright: Well, we are wholly in sympathy with the Court's program of disposing of the case at the earliest possible moment. As I recall, your Honor has definitely set a date for argument as either the 3rd or 4th of January, or at least some time in the first week. Now, we, of course, would like to get a brief from the defendants as far in advance of that argument as we can. That is our problem, and we will do anything possible in the way of serving our brief so that we may have a brief from them at the earliest possible date. I had originally suggested an exchange with that in view, but even if we must file ours first, we would certainly do it at such time as would compel them to file a brief at least a week or more in advance of argument.

Mr. Proskauer: Your Honors, may I suggest this: This case has been a great physical strain due to the shorthand way it was put in. Now, all of my associates here who are going to have the burden of effectual briefing here are unanimous that we cannot do a job under three weeks after we get the Government's

Colloquy.

brief. I assure your Honors that we older men feel that is a wholly reasonable position. There is such a mass of detail here. So whatever Mr. Wright says as

(3402)

to his necessities, I would suggest you grant them and give us three weeks, and then set the argument down for a week after the expiration of that three weeks, and we can have our reply briefs either on the argument or shortly after that, as your Honors may direct.

Judge Hand: How about that, Mr. Wright?

Mr. Wright: I think a week prior to argument is fairly short. We would rather have ten days, but that is —

Judge Hand: Well, all right, we will give you ten days. You have been very cooperative, and we are certainly very grateful. It has been a very pleasant trial, with very pleasant, accomplished people. I do not want to leave a bad taste in anybody's mouth, except the man who is discontented with the ultimate decision, who, I suppose, is never satisfied.

(Discussion off the record.)

Judge Hand: Now, Mr. Wright, what have you got to say in view of all these things? What do you want? Your main brief you will be ready to serve, I take it, about the 10th of December?

Mr. Wright: That is a very tight squeeze, I think, for us. We will endeavor to get, if the defendants are to have three weeks after for theirs, I suppose we would have to file on the 10th. If we were still going to have a week before argument, theirs would be the

(3403)

31st, then I assume the argument would go into the second week in January.

Judge Hand: Yes, I rather think that will have to be so. I think probably both of you need a little

Colloquy

more time to get ready after these main briefs are in. Of course, reply briefs ordinarily, unless they bring up some new point——

Mr. Proskauer: They never amount to anything, your Honor.

Judge Hand: Well, they sometimes do, but they generally do not, I will admit. But sometimes they do a great deal. In the Circuit of Appeals they have sometimes been responsible for deciding a case.

Mr. Wright: Now, in Washington there is just one qualification. We have a very serious typing problem, with the multiple defendants and the Court. If there was some way we could arrange to have service on, let us say, a common agent for these five, and one for the other three, so that we could serve a brief which has been run once on the typewriter on the due date, which, of course, we will have printed up later, I think we could meet that December 10th date, providing we could make service in that manner.

Mr. Proskauer: How many copies would you give us?

(3404)

Mr. Wright: Well, we would have one run, which would be an original and six. I suppose that would mean three for the Court, and we would have to have at least one for our file——

Mr. Proskauer: It is all right, we will print it overnight.

Judge Hand: Do you want the 15th, Mr. Wright?

Mr. Wright: Well, if that is going to extend their time I don't want the 15th. I want to keep——

Judge Hand: Of course it has got to extend their time. I do not believe they can get their stuff in in less than three weeks. What I am awfully anxious about is the length of these briefs. I am death on long briefs. I know you have a lot of things to dis-

Colloquy

cuss, but I am death on long briefs. They confuse and they multiply confusions.

(Discussion off the record.)

Mr. Wright: As far as I am concerned I am willing to abide by any page limitation or other limitation you wish to set on our brief now. I believe too in short briefs. I did serve you with voluminous appendices on that trial brief, but I did supply a 25-page brief.

(3405)

Mr. Proskauer: Your Honors, in this case I think we are going to find ourselves in the position of serving briefs with certain supplemental schedules that you would not read unless you were in doubt as to some fact. Now for example, let me illustrate what I mean. Mr. Caskey has prepared a very elaborate analysis of all these appeal board decisions. I think we ought to hand that to your Honors. But in the brief proper we would reason certain deductions from that long analysis, and the analysis would be just handed to you separately. So I am going to suggest to your Honors, do not give us an artificial form here. Just admonish us that we are going to get much more favorable consideration from the Court if we do not burden them with extensive briefs, and I think we shall obey.

Judge Hand: And you can probably plan that out with one another so as to avoid duplication.

Mr. Proskauer: We are going to do our best to avoid repetition in the briefs.

Judge Hand: All right. Now when do you want to serve your brief, Mr. Wright?

Mr. Wright: We will accept the extra five days that your Honors generously offered and take the 15th.

Colloquy

Judge Hand: All right, the 15th of December.

Mr. Wright: That is with the understanding that we make only two copies available to all the defendants——

(3406)

Mr. Seymour: That is not very practical. I understood Mr. Wright to say he could not do that on December 10th. Unfortunately, their habit of charting makes it very difficult for us to reproduce it properly here.

Judge Hand: Yes, I think so. You had better get it here in suitable form, and stir up the Government Printing Office——

Mr. Wright: I am sure we cannot get a printed brief by the 15th. That is something I have had up with them many times. I cannot get a brief printed in that office within two weeks of the time I submit the original copy. That is the fact as it now is. It is impossible to serve printed briefs.

Judge Hand: Well, they will have great difficulty in their references then.

Mr. Wright: They say they have the facilities here for printing a copy on receipt for their own use, and I propose to give them as many copies as we get from one run of the typewriter.

Mr. Proskauer: Don't worry about that, your Honors. We will print their brief overnight.

Judge Bright: You did not plan to give the Court a typewritten copy, did you?

Mr. Wright: Well, if the Court——

Judge Bright: Why not give counsel our type-

(3407)

written copies and furnish us with the printed copies?

Mr. Wright: That would be agreeable. If your Honors are willing to wait we could then serve——

Colloquy

Judge Bright: You could use those typewritten copies, give them to counsel, and serve us only with a printed one.

Mr. Wright: Yes. We can then serve six copies, and that should be enough for the defendants.

Judge Hand: What is the other proposition?

Mr. Proskauer: My proposition is, your Honor, we will get their brief on Saturday, the 15th, and I suggest that we serve our brief then on Monday, January 7th. That gives us the weekend and three weeks.

Judge Hand: Yes, I think you will have to do that.

Mr. Proskauer: And then you can set the argument, as far as we are concerned, on any day that is agreeable to your Honors and the Government.

Judge Hand: Well, we will probably set it—what day would be the 15th of January?

Mr. Caskey: Tuesday, sir.

Judge Hand: Tuesday. Would that be all right for you?

Mr. Wright: Well, we were to get their briefs when?

(3408)

Mr. Proskauer: Monday, the 7th.

Mr. Wright: Yes, we could go ahead then.

Judge Hand: And then you can get up any reply you want meanwhile. And I should think that ought to be one brief with such charges as you wish to make against the various defendants under a single cover anyway.

I want to remind the defendants now that this does not provide for their having anything really before their argument in the way of a reply brief. What do you care about that?

Colloquy

Mr. Proskauer: Personally I don't. I don't know what anybody else does.

Mr. Davis: I don't, for one.

Judge Hand: All right. They have an indifference to your reply brief, Mr. Wright, which may tend to abbreviate it, I don't know.

Mr. Wright: I did not understand that there was any limitation on our reply. I thought we wanted the time so that we could get ready for the argument. We might wish, and I assume we would have an opportunity to file a reply brief within a few days after the argument. I do not believe we could actually get a brief on file within seven days of the receipt of their brief.

Mr. Proskauer: Your Honor, that is perfectly agreeable to us. Let us just exchange the main briefs, but I think that must mean, of course, Mr. Wright, that you are not going to serve us a pro forma main brief, reserving your fire for your reply brief?

Mr. Wright: We will do the best job we can to make it a complete and full presentation.

Judge Hand: All right. We thank you very much, and we will now adjourn to January 15th for the argument. The various briefs to be dealt with as we have indicated.

(Adjourned until January 15th, 1946, at 10:30 a.m.)

(3410)

PLAINTIFF'S MOTION TO STRIKE OUT CERTAIN TESTIMONY OFFERED BY THE DEFENDANTS

The defendants having rested their case, plaintiff hereby moves to strike out the following testimony offered on their behalf on the grounds hereinafter stated:

Plaintiff moves to strike out the following testimony as incompetent, irrelevant and immaterial because it was either:

a) a conclusion of ultimate fact which was for the Court to draw from facts in evidence, or

b) a conclusion of ultimate fact based upon unoffered primary evidence within the control of the offering defendants, or

c) represented mere speculation based upon facts not in evidence, or

d) was an argument unsupported by facts in evidence, or

e) seeks to establish a reasonable use of a power to exclude competitors and fix prices which is illegal per se:

(1) *The statements of William F. Rodgers, General Sales Manager and Vice-President of Loew's, Inc.:*

(a) that the system of runs used in the industry is necessary, the reasons therefor, and that it is the only basis on (3411)

which you can afford to invest large amounts of money in pictures; and stating what would happen if pictures were shown simultaneously without priority of run (fol. 602-4).

(b) that in negotiating runs he applies the same criteria for theatres affiliated with the co-defendants as he does to theatres owned by independents (fol. 606).

(c) that he has no agreement, contract, understanding or concert of action with the co-defendants or any of their

*Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants*

officers or agents regarding the run that should be given to any theatre (fol. 607).

(d) that if clearance were not given the first-run exhibitor, the subsequent run exhibitors would advertise the picture while the first or other prior run exhibitor is playing it; and stating that only in this way can their collective business be handled (fols. 608-9).

(e) that in fixing clearance he disregards the fact that the theatre involved is affiliated with a co-defendant or with a circuit (fol. 611).

(f) that there is not and never has been any agreement between himself or Loew's with any defendant as to the time or place of clearance, or the granting of clearance to any particular theatre (fol. 611).

(g) that the exhibitor prefers to buy a season's product (3412)

at one time, and that he believes this method is better for the exhibitor (fols. 614-15).

(h) as to advantages to exhibitor of fixing compensation on a percentage rather than a flat rental (fol. 619).

(i) that he does not make the licensing of Loew's pictures to a theatre of a co-defendant dependent as to price, terms or duration, on what that co-defendant may be licensing him (fols. 626-7).

(j) that the theatre owner in specifying the admission price expects to get his availability in many cases based upon the price of admission that he charges (fol. 630).

(k) denying that he procured information relating to the business of the co-dependants, or of competitors from the audit reports (fol. 633).

***Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants***

(l) that there is no agreed division of territory between Loew's and any co-defendant, as far as exhibition or sales is concerned (fol. 634).

(m) that there is no relationship between negotiations or arrangements for the showing of Paramount pictures in Loew's theatres and the licensing of Loew's pictures in Paramount's theatres (fol. 757).

(h) that he has never conditioned the licensing of Loew's (3413)

pictures to Fox West Coast theatres, upon Fox licensing its pictures to Loew's theatres; and that the subject has never been discussed; also that the same is true as to National Theatre groups operating out of Seattle, Denver, Milwaukee and Kansas City (fol. 763).

(o) that the licensing of Loew's pictures to the California group is never conditioned upon the licensing of the pictures in any or all of the theatre groups in Seattle, Denver, Milwaukee or Kansas City (fol. 763).

(p) that none of the groups described in (o) above have conditioned the licensing of Loew's pictures upon Loew's licensing the other groups (fol. 764).

(q) that in licensing R.K.O. theatres there was no conditioning of the showing of R.K.O. pictures in Loew's theatres (fol. 767).

(r) that Republic, Monogram and P.R.C. carry on certain distribution activities and general statements as to what they do (fols. 768-71).

(2) *The statements of Adolph Zukor, Chairman of the Board of Paramount Pictures, Inc.:*

*Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants*

(a) purporting to set forth the reasons why Paramount Pictures, Inc. acquired theatres (fols. 853 to 858).

(b) that the acquisition of theatres by Paramount Pictures, Inc. was not for the purpose of monopolizing the exhibition of motion pictures in the United States (fol. 859).

(c) that Paramount has not at any time monopolized the exhibition of pictures in the United States (fol. 860).

(d) that distribution and exhibition of motion pictures has always been highly competitive (fol. 861).

(e) that Paramount is in competition with the co-defendants and independents in production, distribution and exhibition, at all levels and in all branches (fol. 861).

(f) that the cost of a first class picture has increased from between 40 and 60 thousand dollars, when he went in business, to \$1,500,000 to \$2,000,000 today; and some cost \$3,000,000 (fol. 862).

(g) that there is not and has not been any agreement or understanding among the defendants, or any of them, to restrain competition in the production, distribution and exhibition of motion pictures in the United States (fol. 864).

(h) that there is not and has not been any agreement or understanding among the defendants, or any of them, to aid and assist one another in the loaning and exchanging of production personnel and to deal with one another on uniform, non-competitive terms (fol. 864).

(3415)

(i) that there has not been any agreement or understanding to withhold any production personnel and equipment from any producer of motion pictures (fol. 865).

*Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants*

(j) that there is not and has not been, any agreement or understanding among the defendants or any of them to exclude independent producers from access to production personnel or to withhold production equipment owned by the defendants or any of them on the same terms on which they are made available to the defendants (fol. 865).

(k) that there is not and has not been any agreement or understanding among the defendants or any of them to fix the terms upon which pictures would be licensed to any exhibitor in the United States (fol. 865).

(l) that there is not and has not been any agreement among the defendants or any of them to license pictures in any theatres before they have been produced and before any exhibitor has had a fair opportunity to estimate the value and character of the film and before it has been trade-shown (fol. 866).

(m) that there is not and has not been, any agreement or understanding among any of the defendants to condition the licensing of films or group of films upon the licensing of another film or group of films (fol. 866).
(3416)

(n) that there is not and has not been any agreement or understanding among any defendants to condition the licensing of films in a theatre or theatres upon the licensing of film in another theatre or theatres (fol. 866).

(o) that there is not and has not been any agreement or understanding among any defendants to enter into long term franchises with circuits of theatres or to suppress competition offered by competing theatres during the term of such long term franchises or to preclude independent distributors from licensing their pictures to such circuit theatres (fol. 866).

*Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants*

(p) that there is not and has not been any agreement or understanding among any defendants with respect to the license terms granted to circuit theatres because such theatres are part of the circuit (fol. 866).

(q) that there is not and has not been any agreement or understanding among any defendants in licensing their pictures to favor the theatres in which any defendant had an interest against theatres not affiliated, with respect to run, clearance, license fee or any other terms of licensing (fol. 867).

(r) that there is not and has not been any agreement or understanding among the defendants or any two or more of them to license pictures for exhibition in the theatres in (3417)

which one of the defendants had an interest, on condition or in consideration of another licensing its pictures with respect to the pictures distributed by the other (fol. 867).

(s) that there is not and has not been any agreement or understanding among any of the defendants to exclude independently produced pictures from theatres in which any defendant has an interest (fol. 868).

(t) that there is not and has not been any agreement or understanding among any defendants to exclude unaffiliated exhibitors from the operation of competing first-run theatres in places where theatres affiliated with defendants are located (fol. 868).

(u) that there is not and has not been any agreement or understanding among any defendants to exclude unaffiliated exhibitors from operating competing theatres on the same run as the subsequent run affiliated theatres in places where affiliated theatres are located (fol. 868).

(v) that there is not and has not been any agreement or understanding among any defendants to use the first and

*Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants*

early run affiliated theatres to control the film supply, run, clearance and admission price of operators of competing unaffiliated theatres in places where affiliated theatres are located and elsewhere. (fol. 869).
(3418)

(w) that there is not and has not been any agreement or understanding among any defendants as to the terms upon which each or any of them would license their film to unaffiliated exhibitors (fol. 869).

(x) that there is not and has not been any agreement or understanding among any defendants to deprive any theatre operator of film supply or to withhold film from an unaffiliated exhibitor or to limit the terms and conditions on which licenses would be made to any unaffiliated exhibitor (fol. 869).

(y) that there is not and has not been any agreement or understanding among any defendants to divide available films among affiliated theatres owned or controlled by two or more producer-exhibitor defendants located in the same competitive area without competitive negotiations (fol. 869).

(z) that there is not and has not been any agreement or understanding among any defendants not to compete with each other in licensing pictures to be exhibited in places where two or more of them had interests in theatres (fol. 869).

(aa) that there is not and has not been any understanding or agreement among any defendants to enter into joint agreements with respect to a theatre whereby film buying control or operation proceeds is divided between two or more
(3419)

exhibitor defendants for the purpose of restraining competition unreasonably or monopolizing exhibition or distribution with respect to such theatre (fol. 870).

*Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants*

(bb) that there is not and has not been any understanding or agreement among any defendants to refrain from building, buying or offering to lease theatres in areas where they might compete with existing affiliated theatres (fol. 870).

(cc) that there is not or has not been any agreement or understanding among any defendants to acquire a monopoly or to monopolize the business of exhibiting pictures in the United States or any city or town thereof (fol. 870).

(dd) that as far as his company is concerned there was never any agreement with Warner's or anybody else as to where his company or Warner's should operate or what the two respective companies should do (fols. 873-4).

(ee) that he never made any agreement with Warner's or anybody regarding subject covered in (dd), (fol. 874).

(ff) that there was no agreement not to go into any territory where Warner's had theatres or for Warner's not to go into territory where Paramount had theatres or an interest therein (fol. 874).

(3420)

(3) *The statements of Y. Frank Freeman, Vice-President of Paramount, and until October 1944 in charge of their studio operations in Hollywood:*

(a) that since 1938 the cost of the production of a top bracket picture has increased 100 to 150% (fols. 822-3).

(b) that competitive bidding results in prices as high as \$450 for a stage play for production of a picture (fol. 884).

(c) that there is no agreement or understanding to limit the practice of exchanging stars, production material, etc. to the defendants in this case (fol. 902).

*Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants*

(4) *The statements of Charles M. Reagan, Vice-President of Paramount Pictures, Inc. in charge of sales for the United States and Canada:*

(a) that the cost of production of Paramount pictures has been going up; that the cost of production is much greater than it was even a few years ago (fol. 947).

(b) that there is no joint advertising by the distributors about all their pictures (fol. 956).

(c) that there is no discrimination between affiliated and independent theatres in cooperative advertising (fol. 957).

(3421)

(d) that there is no relationship between his negotiations, or that of his colleagues, with Loew's Inc. for the licensing of Paramount pictures in Loew's theatres and the negotiations for the licensing of Metro pictures in theatres in which Paramount has an interest (fol. 965).

(e) that as to negotiations or arrangements made or under way for exhibition of Warner pictures in Paramount theatres, there is no relationship between them; and vice versa (fol. 969).

(f) that the deals are indiscriminately negotiated (fol. 981).

(g) that in selecting the theatre to which Paramount pictures will be licensed first run, he doesn't apply any different criterion to the theatres in which the defendants have an interest than he does where they have no interest (fol. 991).

(h) that there is keen competition in the distribution of films (fol. 986).

(i) that where one distributor grants clearance that is identical or nearly identical to the clearance granted by an-

***Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants***

other distributor to the same theatre, this is not the result of any agreement or understanding between the distributors (fol. 999).

(j) that exhibitors generally charge the same admission (3422) price over a long period of time and the reasons therefor (fol. 1015).

(k) that the public would object if admission prices were changed from picture to picture, or repeatedly (fols. 1015-16).

(l) that with reference to admission charges there is no difference whether an exhibitor is independent or affiliated (fol. 1016).

(m) that the frequent uniformity of minimum admission prices in contracts with a particular exhibitor from several distributors, does not result from any agreement or understanding between the distributors (fol. 1016).

(n) that the fact that various subsequent runs have about the same admission prices in the same area does not result from any agreement or understanding between the distributors (fol. 1018).

(o) that one exhibitor will decide to charge a certain admission price and if the theatre is successful the others quickly copy him (fol. 1018).

(p) that there is no difference in the consideration given to cancellations depending on the source of the request (fol. 1024).

(q) that the fact of whether a defendant has an interest in a theatre or not does not affect whether his product is split (3423) (fol. 1025).

*Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants*

(r) that he could not effectively offer to license his pictures on the basis of competitive bidding (fol. 1035).

(s) that the licensing of Paramount pictures to Loew's Inc. on a particular run in New York City, and the licensing of pictures of other distributors either to Loew's, Inc. or R.K.O. is not the result of any understanding or agreement between the distributors (fol. 1138).

(t) that the fact that Paramount licenses to Loew's, Inc. on certain runs is not to the result of any agreement between distributors other than Paramount and Loew's (fol. 1139).

5. *The statements of Martin J. Mullin*, Vice-President and General Manager of M. & P. Theatres; Vice-President of New England Theatres; an officer of Publix Notoco and President of its subsidiaries;

(a) that there is no relationship between the terms of film deals for theatres he operates and negotiations or arrangements made for licensing or exhibiting Paramount films in theatres of any other defendant (fols. 1343-44).

(b) giving his theory as to what would happen if his (3424) admission prices were changed regularly (fols. 1348-49).

(6) *The statements of John J. Friedl*, President and General Manager of Minnesota Amusement Company:

(a) giving his theory as to the economic condition of the industry at the time an operating agreement between R.K.O. and Minnesota Amusement was in effect (fols. 1376 to 1378).

(b) that there is no relationship between his negotiations with distributors and negotiations or arrangements which may be made by Paramount or the distributors with respect to other theatres (fol. 1385).

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(c) that the length of clearance has nothing to do with whether the theatre is one of his or that of an independent (fols. 1396-97).

(d) that there is no difference in clearance based upon the fact of affiliation (fol. 1399a).

(e) that to the best of his knowledge the similarity of clearance does not result from any agreement or understanding among the distributors (fol. 1424).

(7) *The statements of Edward C. Beatty, President and Treasurer of W. S. Butterfield Theatres, Inc. and Butterfield Theatres Corporation:*

(a) that the status of operation of R.K.O. theatres in (3425) Grand Rapids, Michigan, was very poor in 1933 (fol. 1440).

(b) that one theatre referred to above in Grand Rapids, Michigan, was closed because of the lack of business and that the other one was not very successful (fol. 1440).

(c) that due to changes in theatres after an operating agreement was effected, the public got better facilities for seeing pictures in Grand Rapids, Michigan (fol. 1442).

(d) contained in his affidavit supplementing the testimony he gave on the witness stand (fols. 3385-88).

(8) *The statements of Spyros P. Skouras, President of Fox:*

(a) giving negative answers to the so-called "Zukor" questions concerning conspiracy, unreasonable restraint of trade and monopoly (fols. 1453 to 1458-a).

(9) *Statements of William J. Kupper, General Sales Manager of Fox:*

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(a) that the first run exhibitor would not object if subsequent runs charged higher admission prices than specified in the contract (fol. 1504).

(b) that the length of time a picture will play in a first run theatre of Loew's Inc. in Worcester is not conditioned (3426) upon the length of time Fox will play a Loew's picture (fol. 1538).

(c) that there is no exchange of screen time between the defendants (fol. 1538).

(d) that his company and the other defendants have not "ganged up" on the independent exhibitors (fol. 1628).

(e) giving negative answers to the so-called "Zukor" questions concerning conspiracy, unreasonable restraint of trade and monopoly (fol. 1628).

(f) that there is no relationship between licenses Fox negotiates with Paramount operating companies for exhibition of Fox pictures in Paramount theatres and licenses for Paramount pictures in Fox theatres; and also the same statements (by stipulation) as to the other defendants (fol. 1629).

(g) that no exhibitor who has followed an affiliated exhibitor has been prejudiced or injured by omission of admission prices from the contract (fol. 1695).

(h) and all of his statements contained in a pamphlet entitled "Extension of Wm. J. Kupper Testimony"—pages 1 thru 94, (Exhibit F-30, fol. 3397). (3427)

(10) *The statements of A. W. Smith, Jr., Eastern Sales Manager of Fox and having jurisdiction over exchanges in the Eastern part of the country:*

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(a) giving negative answers (by stipulation) to the so-called "Zukor" questions relating to conspiracy, unreasonable restraint of trade and monopoly; and giving negative answers to the so-called "Skouras" questions relating to conspiracy, unreasonable restraint of trade and monopoly (fol. 1697).

(11) *The statements of Joseph M. Schenck, an executive in the production department of Fox:*

(a) giving the reasons why Charlie Chaplan did not subscribe to a franchise which gave United Artists' Circuit theatres exclusive right to first run exhibition of United Artists' pictures in towns where they were located (fol. 1706).

(b) that he had no knowledge of an agreement among any of the defendants to aid or assist one another in loaning and exchanging production personnel and deal with each other on non-competitive basis (fol. 1711).

(c) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly as to production personnel and equipment (fols. 1711-12).

(d) giving negative answers to the so-called "Zukor" (3428) questions relating to conspiracy; restraint of trade and monopoly as to general activities of the defendants (fols. 1712 to 1715).

(12) *The statements of Felix A. Jenkins, Secretary and Director of Fox:*

(a) that Fox has not conspired with any other defendant or defendants to monopolize or restrain trade and commerce (affidavit—stipulated) (fol. 1730).

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¶13) *The statements of Abraham Montague, General Sales Manager of Columbia:*

(a) that the exhibitor knew what he was buying when he bought a year's product (fol. 1736).

(b) that "blind selling" or "block booking" is the most satisfactory method of distribution from the exhibitor's standpoint (fol. 1737).

(c) that the "block booking" method of selling is vital to Columbia and his theory as to why (fols. 1737-38).

(d) that his company has no understanding, arrangement or agreement with any defendant except the contracts for exhibition of pictures in their theatres (fol. 1739).

(e) that Columbia spent \$1,632,300 for production in 1928 and that amount has increased each year (fol. 1740). (3429)

(f) that Columbia faces competition from all defendants (fol. 1743).

(g) that his company treats affiliated and independents the same as to selectivity (fol. 1750).

(h) that the action of NRA affected standard contracts, admission prices, etc. and that this was for the protection of the exhibitor (fols. 1751-52).

(i) that exhibitors have been very successful in the last ten years (fol. 1754).

(j) giving his reasons why "block booking" is necessary for Columbia and his theory as to what would happen without it (fols. 1754-55).

(k) that the situations applicable as to Columbia also apply to Republic, P.R.C., Universal, and Monogram (fol. 1789).

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(l) as to the general activities of other companies and associations (fols. 1790 to 1794).

(m) that the subsequent run theatres have been very prosperous in the past ten years (fol. 1799).

(n) that the cost of top pictures has increased in the last ten years, giving the figures (fol. 1801).

(o) that there is no relationship between licenses granted one Paramount affiliate (Minnesota Amusement) and those granted another (New England) (fol. 1802).
(3430)

(p) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly (by stipulation) (fol. 1808).

(14) *The statements of Paul N. Lazarus, Manager of the Contract Department of United Artists:*

(a) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade, and monopoly (fol. 1948).

(15) *The statements of Harry J. Muller, Treasurer of United Artists:*

(a) that there has been a progressive increase in the cost of domestic distribution during the last ten years, (with exceptions) (fol. 1995).

(b) that advertising cost from 1945 to date is 35% higher than corresponding period of last year (fol. 1995).

(16) *The statements of Edward C. Raftery, President of United Artists:*

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(a) giving negative answers (by stipulation) to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly (fol. 1998).
(3431)

(17) *The statements of William A. Scully, Vice-President and General Sales Manager of Universal:*

(a) that independents and affiliates are treated alike regarding selectivity (p. 2017).

(b) indicating the desires of exhibitors regarding product (fols. 2017-18).

(c) that exhibitors like "block booking" and why (fol. 2018).

(d) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly (fol. 2036).

(e) that his company does not discriminate between independents and affiliates (fol. 2036).

(18) *The statements of Benjamin Kalmenson, Sales Manager of Warner:*

(a) That no contracts since 1938 contain covenant on part of Warner to require subsequent run exhibitor to charge any particular price (fol. 2069).

(b) that most Warner contracts do not refer at all to subsequent admission prices as criterion of clearance (fol. 2071).

(c) that showing in their own theatres benefit first and subsequent run exhibitors (fol. 2076).

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(d) giving negative answers to the so-called "Zukor" (3432) questions relating to conspiracy, restraint of trade and monopoly (fol. 2077).

(e) that his company uses no devices to discriminate against independent exhibitors (fol. 2077).

(19) *Statements of Jason J. Joy, Executive of Fox, having charge of all personnel at studio except actors;*

(a) that no distinction is made as to whether producer is affiliated or independent in deciding whether they will lend a star or feature player (fol. 2100).

(b) that the cost of producing pictures increased during the last ten years (fol. 2125).

(c) that competition for books, plays and similar material applies to all companies (fol. 2128).

(20) *The statements of Harry M. Warner, President of Warner:*

(a) that his company has not monopolized, etc. (by stipulation) (fol. 2129).

(b) that the only way to solve their difficulties was to acquire theatres (fol. 2132).

(c) that theatres were not acquired to avoid competition (fol. 2134).

(d) that First National was not acquired to stifle competition in production and distribution (fol. 2135). (3433)

(e) denying that Warner conditions licensing to other defendants on reciprocal basis (fol. 2137).

(f) that divorcement of theatres will jeopardize the industry (fol. 2140).

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(g) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade, and monopoly (fols. 2141 to 2146a).

(21) *The statements of Barney Balaban, President of Paramount:*

(a) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade, and monopoly (fol. 2147).

(22) *The statements of Nathaniel P. Rathoon, President of R.K.O.:*

(a) giving his theory as to the advantages of integration of production, distribution and exhibition; and the effect of their separation (fol. 2217).

(23) *The statements of Robert Mochris, General Sales Manager of R.K.O.:*

(a) that the annual cost of operating the R.K.O. distribution system is in excess of \$7,000,000 (fol. 2308).

(b) that his company, and the other distributor-defendants (3434) have never combined and conspired to monopolize the distribution of motion pictures and to exclude from that business independently produced pictures, and that his company has no such understandings or agreements (fols. 2311-12).

(c) that in selling pictures his company is competing and did compete during the 1943-44 season with some companies (fol. 2312).

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(d) that in selling to independents or affiliates he does not make any distinction between them as to whether he will insist on a block of five or not (fol. 2318).

(e) that the fact that a theatre is or is not affiliated with one of the integrated companies does not constitute a factor in his choice of customers (fol. 2328).

(f) that there is no difference in applying his company's policy between towns where the first run theatres are both affiliated and independent and towns where all the first run theatres are independent (fol. 2331).

(g) that there is no agreement between R.K.O. and any other defendant whereby R.K.O. agrees that it will continue to serve its present customers and will not entertain bids from others (fols. 2336-37).
(3435)

(h) that the fact that the theatre is affiliated or independent has nothing to do with the length of time that R.K.O. will run a picture; and that he fights with all of them to run pictures as long as he can get them to (fol. 2339).

(i) that the fact that a theatre is operated or controlled by an integrated company does not constitute any factor at all in deciding the clearance to be granted it (fol. 2339).

(j) that he has no agreements or understandings that he will adopt the same clearance (fol. 2349).

(k) that in making certain contracts he did not differentiate between theatres operated or controlled by integrated companies or other theatres (fol. 2351).

(l) that in licensing his pictures for exhibition in theatres affiliated with another defendant, he does not agree

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in the contract or agree orally upon the admission price to be charged by subsequent run theatres (fol. 2361).

(m) that he has never licensed R.K.O. pictures to the-
atres affiliated with an integrated company on the condition
or understanding that that company extend particular terms
to any R.K.O. theatres (fol. 2362).

(n) that the fact that an integrated company licensed
(3436)
pictures to any of R.K.O.'s theatres does not in any way
effect his readiness to license his pictures to theatres affili-
ated with such an integrated company; or have any bearing
on the terms which he will extend to theatres affiliated with
such integrated company (fol. 2362).

(o) that he is in absolute, keen, continuous competition
all of the time to sell pictures (fols. 2368-69).

(p) that the subsequent run exhibitor prefers the pic-
tures which have a longer first run over the one that has a
shorter first run; and that he (the subsequent run exhibitor)
has found from experience that it will gross more business
for him and certainly he wants it (fol. 2403).

(q) that he (the subsequent run exhibitor) does not
suffer the inconvenience of not knowing the exact date on
which he is going to get that picture; he (the witness)
thinks the subsequent run exhibitor is glad to have a picture
like that available to him (fols. 2403-04).

(24) *Part of R.K.O.'s Exhibit 25 as follows:*

(a) that part of Exhibit R.K.O.-25 which gives the ac-
quisition cost of the various theatres shown in the table (fol.
2473).

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(25) Warner's Exhibit W-5 which is a table giving total film rentals received by Warner and its subsidiaries from domestic and foreign sources (fol. 2479).

(26) Warner's Exhibit W-10 which is a table for the years 1931 to 1945 purporting to show the cost of American-made Warner Feature Pictures and the average theatre admission prices at Warner theatres (fol. 2483).

(27) Warner's Exhibit W-11 which is a table for the years 1937 to 1944 purporting to show percentage of Warner Film Cost paid to Warner as film rental by Warner theatres and theatres affiliated with other four Distributor Defendants (fol. 2485).

(28) Warner's Exhibit W-12 which is a schedule showing a comparison of the cost of the positive print of "Princess O'Rourke" and the average film rental per booking (fol. 2486).

(29) The statements of Joseph Bernhard, head of Warner's Theatre Department until November 7, 1945:

(a) that Warner's did not acquire an interest in any theatre during his tenure of office with the purpose of having theatres where they would not be in competition with the theatres of any other person or company; and that there was no agreement or understanding, express or implied, to such effect (fol. 2496).

(b) that all of their theatres were acquired in the open market and in most cases in open and keen competition; and some of such theatres were acquired in competition with competing companies engaged in producing pictures (fol. 2487).

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(c) that as head of the Theatre Department he has had no policy for the expansion of theatre holdings (fol. 2497).

(d) that any theatres acquired during the time he was employed by Warner were to protect their business and meet varying economic conditions, shift of populations or needs caused by obsolescence which had arisen with the changes over the years (fol. 2497).

(e) that he always operated the Theatre Department separate and apart from the Distribution Department and has never allowed the operations of the Distribution Department to influence his judgment in the licensing of pictures for the Theatre Department (fol. 2497).

(f) Warner's Exhibit W-15 purporting to give a collation from the Theatre Department and Distribution Department of instances bearing out the witness's testimony (fols. 2497-8).

(g) giving negative answers to questions relating to conspiracy, restraint of trade and monopoly (3439).

(h) giving negative answers to questions similar to the Skouras' answers pertaining to the same subject (fols. 2499 to 2504).

(30) *The statements of Nicholas N. Schenck, President of Loew's:*

(a) that there is not now and has not been any contract, agreement, understanding or concert of action between Loew's Incorporated and any one or more of the defendants with respect to matters described as (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), and (17) in his testimony (fols. 2514 to 2517).

(b) that with the exception of individual license contracts entered into between Loew's and other distributors

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or vice-versa, there has been no combination of the defendants to do the acts mentioned in (a) above, after the ending of the National Recovery Act (fol. 2517).

(c) that Loew's has not prevented any defendant or any independent producer from competing with Loew's in the production of films (fols. 2517).

(d) that Loew's has not prevented any defendant or independent distributor from competing with Loew's in the distribution of films (fol. 2518).

(3440)

(e) that Loew's has not prevented any defendant or any unaffiliated exhibitor from competing with Loew's in the operation of theatres (fol. 2518).

(f) that Loew's has never discriminated in favor of "affiliated" or "circuit" theatres and against "independent" theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of such affiliation (fol. 2518).

(g) that Loew's has never conditioned its granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's (fol. 2518).

(h) that no other producer-exhibitor defendant ever has conditioned its granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's upon Loew's granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by such other defendant (fol. 2518).

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(i) that Loew's has never had and does not now have, any agreement or understanding with any distributor with respect to the minimum admission prices which such distributor should insert in its licenses for any theatre or theatres not operated or controlled by Loew's (fols. 2518-19).

(j) that Loew's has never had and does not now have, any agreement or understanding with any distributor with respect to the run which such distributor should grant for any theatre or theatres not operated or controlled by Loew's or the order of sequence of runs between such theatres (fol. 2519).

(k) giving negative answers (by stipulation) to the so-called "Zukor" questions relating to conspiracy, unreasonable restraint of trade and monopoly (fol. 2519).

(31) *The statements of Rudolph Berger, J. E. Flynn, E. K. O'Shea, J. J. Maloney and G. A. Hickey, Division Sales Managers of Loew's:*

(a) that in the respective exchange areas over which they have supervision, there is not now and has not been any contract, agreement, understanding or concert of action between Loew's and any one or more of the defendants with respect to any of the matters set forth in paragraphs (1) through (13) under item "2" of their testimony (fols. 2523 to 2525).

(b) that except for the individual contracts licensing the exhibition of films which Loew's as a distributor or exhibitor has made with any of the defendants, there has not been any combination of the defendants to do the acts specified in paragraph (a) above at any time after the ending of the National Recovery Act (fol. 2525).

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(c) that Loew's has not prevented any defendant or any independent distributor from competing with Loew's in the distribution of films (fol. 2525).

(d) that Loew's has never discriminated in favor of "affiliated" or "circuit" theatres and against "independent" theatres with respect to any of the license terms granted because of the fact of being a part of a circuit or because of affiliation (fols. 2525-26).

(e) that Loew's has never conditioned its granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by another producer-exhibitor defendant upon such other defendant granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's (fol. 2526).

(f) that Loew's has no agreement or understanding with any prior run exhibitor either "affiliated" or "independent" fixed the minimum admission price which Loew's must insert in its license agreement with a subsequent run exhibitor (fol. 2526).
(3443)

(32) *The statements of Joseph R. Vogel and Charles C. Moskowitz, Vice-Presidents of Loew's and in charge of the theatres operated by that company:*

(a) that there is not now and has not been any contract, agreement, understanding or concert of action between Loew's and any one or more of the defendants with respect to any of the matters described in paragraphs (1) through (11) under item "1" of their testimony (fols. 2527-28).

(b) that except for individual contracts licensing the exhibition of Loew's films, as a distributor or exhibitor, made

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with another defendant, there has been no combination of the defendants to do the acts outlined in (a) above at any time after the ending of the National Recovery Act (fol. 2529).

(c) that Loew's has not prevented any defendant or "unaffiliated" exhibitor from competing with Loew's in the operation of theatres (fol. 2529).

(d) that no other producer-exhibitor defendant has ever conditioned its granting Loew's a license for the exhibition of films distributed by such other defendant in theatres operated or controlled by Loew's upon Loew's granting a license for the exhibition of films distributed by Loew's in theatres operated or controlled by such other defendant (fol. 2529).

(e) that Loew's has no agreement or understanding with (3444) any distributor, either "affiliated" or "independent," fixing the minimum admission price which a subsequent run exhibitor of said distributor's feature pictures must charge (fol. 2529).

(33) *The statements of George A. Smith, Western Division Sales Manager for Paramount:*

(a) that in licensing Paramount pictures for exhibition in theatres in which any other defendant is interested, neither he nor his associates are concerned as to whether or not that defendant as a distributor licenses or refuses to license its pictures for exhibition in any theatre in which Paramount is interested, or with the terms upon which they are licensed (fol. 2560).

(b) that the Distribution Department is not concerned in any way with the matters mentioned in (a) above (fol. 2560).

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(c) that in negotiating with the heads of the various exhibition companies associated with National Theatres Corporation such negotiations with these individuals are separately conducted and wholly independent of each other (fol. 2561).

(d) that the licensing of pictures with any of the National Theatres Corporation companies is not dependent in any way upon the success or failure of negotiations with any of the other companies (fol. 2561).
(3445)

(e) that in negotiating with representatives of various companies associated with National Theatres Corporation he has no knowledge or information as to whether or not Fox is negotiating to license or has licensed Fox films for exhibition in any of the Paramount theatres (fol. 2561).

(f) that there is no relation whatever between his negotiations for the licensing of Paramount pictures and the licensing of Fox pictures for exhibition in any of the Paramount theatres (fol. 2561).

(g) that he never refuses to license Paramount pictures to the various theatre companies associated with National Theatres Corporation unless and until any of the theatres in which Paramount is interested has offered or concluded licenses for Fox pictures (fol. 2561).

(h) that except for individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, he does not have any agreement or understanding with any distributor as to whether Paramount will or will not license its pictures to any exhibitor, or as to terms, including run and clearance upon which Paramount pictures will be licensed to any exhibitor (fol. 2562).
(3446)

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(i) that subject to the exceptions noted in (h) above, he does not have any agreement with any distributor as to the admission prices which are charged or to be charged by any "affiliated" or "unaffiliated" theatre (fol. 2562).

(j) that subject to the exceptions noted in (h) above, he does not communicate to any distributor the terms upon which Paramount has licensed or will license the exhibition of Paramount pictures to any "affiliated" or "unaffiliated" exhibitor (fols. 2562-3).

(k) that he does not receive any information as to the terms upon which other distributors have licensed or will license their pictures to any "affiliated" or "unaffiliated" exhibitor (fol. 2563).

(l) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly (fol. 2579).

(34) *The statements of William H. Erbb, Eastern Division Manager for Paramount:*

(a) that in licensing Paramount's pictures for exhibition in theatres of other defendants, he and his associates are not concerned as to whether or not that defendant as a distributor licenses or refuses to license its pictures for exhibition in any Paramount theatre, or with the terms upon which (3447) they are licensed (fol. 2565).

(b) that the Distribution Department is not concerned in any way with the matters mentioned in (a) above and that such matters are beyond the functions of the Distribution Department (fols. 2565-6).

(c) that there is no relationship between his negotiations for the licensing of Paramount pictures to companies asso-

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ciated with Warner's and the licensing of the pictures of that defendant for exhibition in any Paramount theatres (fol. 2566).

(d) that he does not ever refuse to license Paramount pictures to companies associated with Warner's unless and until any of the Paramount theatres have offered or concluded licenses for the theatres of that defendant as a distributor (fols. 2566-67).

(e) that except for individual license agreements made with a particular defendant for the exhibition of Paramount pictures in theatres of that defendant, he has no agreement or understanding with any distributor as to whether Paramount will or will not license the exhibition of their pictures to any exhibitor, as to the terms, including the terms as to run and clearance upon which Paramount pictures will be licensed to any exhibitor (fol. 2567).

(f) that with the exceptions noted in (e) above, he does not have any agreement with any distributor as to the admission prices which are charged or to be charged by any "affiliated" or "unaffiliated" exhibitor (fol. 2567).

(35) *The statements of James J. Donohue, Central Division Manager of Paramount:*

(a) that except for individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, he does not have any agreement or understanding with any distributor as to whether Paramount will or will not license the exhibition of Paramount pictures to any exhibitor, or as to the terms, including the terms as to run and clearance upon which Paramount pictures will be licensed to any exhibitor (fols. 2571-72).

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(b) that subject to exceptions stated in (a) above, he does not have any agreement with any distributor as to the admission prices which are charged or to be charged by any "affiliate" or "unaffiliated" exhibitor (fol. 2572).

(c) that subject to exceptions stated in (a) above, he does not communicate to any distributor the terms upon which Paramount has licensed or will license the exhibition of its pictures to any "affiliated" or "unaffiliated" exhibitor (fol. 2572).

(3449)

(d) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly (fol. 2579).

(e) contained in an affidavit (fols. 2580 to 2618).

(36) *The statements of Hugh Owen, Southern Division Manager of Paramount:*

(a) that in licensing Paramount pictures for exhibition in theatres in which any other defendant is interested, he and his assistants are not concerned as to whether or not that defendant, as a distributor, licenses or refuses to license its picture for exhibition in any Paramount theatre, or with the terms upon which they are licensed (fol. 2575).

(b) that the Distribution Department is not concerned in any way with the matters mentioned in (a) above; and that such matters are entirely beyond the function of the Distribution Department (fol. 2575).

(c) that his negotiations with Mr. Vogel and Mr. Moskowitz are separately conducted and independent of each other (fol. 2576).

(d) that the licensing of pictures in the field where Mr. Moskowitz represents Loew's are not dependent in any way

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upon the success or failure of negotiations with respect to the field in which Mr. Vogel represents Loew's (fol. 2576). (3450)

(e) that there is no relationship between his negotiations for the licensing of Paramount pictures for exhibition in Loew's theatres or in R.K.O. theatres, and the licensing of the theatres of either of those defendants for exhibition in any of Paramount's theatres (fols. 2576-77).

(f) that he does not ever refuse to license Paramount pictures for exhibition in Loew's theatres or R.K.O.'s theatres unless and until any of Paramount theatres have offered or concluded licenses for the pictures of either of those distributors (fol. 2577).

(g) that except for individual license agreements made with a particular defendant for the exhibition of Paramount pictures in the theatres of that defendant, he has no agreement or understanding with any distributor as to whether Paramount will or will not license the exhibition of Paramount pictures to any exhibitor, or as to the terms, including the terms as to run and clearance upon which the Paramount pictures will be licensed to any exhibitor (fols. 2577-78).

(h) that subject to the exceptions noted in (g) above, he has no agreement with any distributor as to the admission prices which are charged or to be charged by any "affiliated" or "unaffiliated" exhibitor (fol. 2578).

(3451)

(i) giving negative answers to the so-called "Zukor" questions relating to conspiracy, restraint of trade and monopoly (fol. 2578).

(37) *All of the statements of Sam Dembow, President of Golden Pictures, Inc. (fols. 2624 to 2632).*

*Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants*

(38) *The statements of Harry David, General Manager, Northio Theatres Corp.; John Balaban, General Manager, Balaban & Katz Corp.; Harry M. Warren, General Manager, Central States Theatre Corp.; J. J. O'Leary, President, Comerford Publix Theatres Corp.; Hunter Perry, President, Dominion Theatres, Inc.; Frank Rogers, President, Florida State Theatres, Inc.; Tracy Barham, Vice-President and General Manager, Inter-Mountain Theatres, Inc.; R. J. O'Donnell, General Manager, Interstate Circuit, Inc.; S. L. Oakley, Vice-President, Jefferson Amusement Co.; John J. Ford, Treasurer and General Manager, Maine & New Hampshire Theatre Co.; Frank Rogers, President and General Manager, Paramount Enterprises, Inc.; Harry Royster, General Manager, Paramount Pictures Theatre Corp.; E. V. Richards, Jr., President, Paramount-Richards Theatres, Inc.; Anast N. Notopolulos, President, Pennware Theatre Corp.; Alpenn Theatre Corp. and Penler Theatre Corp.; Carl R. Bamford, President, Publix-Bamford Theatres, Inc.; Jules J. Rubens, General Manager and Vice-President, Publix-*

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Great States Theatres, Inc.; Harry L. Nace, Vice-President, and General Manager, Publix-Rickards-Nace, Inc.; George Zeppos, Vice-President and General Manager, Publix Wheeling Corp.; R. J. O'Donnell, General Manager, Texas Consolidated Theatres, Inc.; G. Ralph Branton, General Manager, Tri-States Theatre Corp.; Earl J. Hudson, President, United Detroit Theatres, Corp.; Nathan E. Goldstein, President, Western Massachusetts Theatres, Inc.; H. F. Kincey, Secretary, Wilby-Kincey Service Corp.; R. B. Wilby, President, Wilbey-Kincey Service Corp.; Wm. K. Jenkins, President, Georgia Theatre Co.; M. A. Lightman, President, Malco Theatres, Inc. and Malco-Memphia and Vice-President, Richards Lightman Theatres, Inc.; E. H. Rowley, President, Arkansas Amusement Co.;

*Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants*

(a) that there is no relationship whatever between the terms of film deals negotiated for the theatres which the respective witnesses operate and any negotiations or arrangements for the licensing or exhibition of Paramount films in theatres of any other defendant (respective affidavits attached to Exhibit P-24).

(b) that there is no relationship whatever between film deals of their respective companies and film deals of any other companies in which Paramount is interested (respective affidavits attached to Exhibit P-24).
(3453)

(c) that no representative of Paramount participates or interferes in any way in their respective negotiations with distributors for the licensing of films to be used in theatres operated by their respective companies or dictate or advise them as to the terms of any film license contracts that they respectively make or are to make with any other distributor (respective affidavits attached to Exhibit P-24).

(d) that there are theatres operated by the respective witnesses in which they would like to license the pictures of Loew, Fox, Warner, R.K.O., Columbia, Universal and United Artists where they are unable to do so (respective affidavits attached to Exhibit P-24).

(e) that in the cases referred to in (a) above, the distributors mentioned, license some or all of their pictures to theatres which are in competition with the theatres operated by the respective witnesses (respective affidavits attached to Exhibit P-24).

(f) that their respective companies follow a policy of keeping all theatres operated by them up to date in accordance with the needs of the community (respective affidavits attached to Exhibit P-24).

***Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants***

(39) *All of the statements contained in the 104 affidavits which comprise Exhibit P-25.*
(3454)

(40) *All of the statements of Jules Lapidus, Warner, Eastern Sales Manager; and Roy Haines, Western and Southern Sales Manager for Warner (fols. 2634 to 2639).*

(41) *All of the statements contained in the affidavit of Harold J. Fitzgerald, President and operating head of Fox Wisconsin Theatres, Inc. (fols. 2671 to 2713).*

(42) *All of the statements contained in the affidavit of Frank L. Newman, Sr., President of Evergreen State Amusement Corp. (fols. 2713 to 2758).*

(43) *All of the statements contained in the affidavit of Elmer C. Rhoden, President and operating head of Fox Mid West Theatres, Inc. (fols. 2728 to 2810A).*

(44) *All of the statements contained in the affidavit of F. H. Ricketson, Jr., President and Director of Fox-Inter-Mountain Theatres, Inc. (fols. 2811 to 2840).*

(45) *All of the statements contained in the affidavit of Charles P. Skouras, President, National Theatres Corp., (fols. 2841 to 2909).*

(46) *All of the statements contained in the affidavit of Dan Michalove, Vice-President and Director of the National Theatres Corp. (fols. 2921 to 2924).*
(3455)

(47) *All of the statements contained in the affidavit of Harry G. Ballance, Southern District Sales Manager of Fox (fols. 2925 to 2929).*

***Plaintiff's Motion to Strike Out Certain Testimony
Offered by the Defendants***

(48) *All of the statements* contained in the affidavit of William C. Gehring, Central Division Sales Manager of Fox (fols. 2929 to 2933).

(49) *All of the statements* contained in the affidavit of Herman Webber, Divisional Sales Manager of Fox (fols. 2933 to 2937).

(50) *All of the statements* contained in the affidavit of Harold J. Mirisch, Head of the Licensing Department of R. K. O. (fols. 2939 to 2941).

(51) *All of the statements* contained in the affidavit of Ned E. Depinet, President of R. K. O. (fols. 2941 to 2946).

(52) *All of the statements* contained in the affidavit of Malcolm Kingsberg, Vice-President and Treasurer of R. K. O. (fols. 2946 to 2948).

Respectfully submitted,

ROBERT L. WRIGHT,
Special Assistant
to the Attorney General